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Professional Responsibility Issues in International Law Practice

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The present Code of Professional Responsibility (CPR)[1] is essentially geared to guide the conduct of the lawyer as advocate or litigator.[2] It is certainly of assistance to the American international lawyer in establishing guidelines for his conduct, but only of limited assistance since the international lawyer usually serves more as an advisor to, or negotiator for, his clients. In contrast, the recent ABA draft Model Rules of Professional Conduct (MRPC)[3] provide a more useful basis for examination of the international lawyer's ethical responsibilities, as they do in many respects for the corporate or commercial lawyer who assists domestic clients in domestic practice. Whether or not the MRCP is ultimately adopted (and it certainly has proved controversial),[4] the draft does serve to stimulate thought

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1. American Bar Association, *Code of Professional Responsibility* (1977). The Code of Professional Responsibility was adopted by the House of Delegates of the ABA on 12 August 1969. All references in this article are to the version as most recently amended in August 1977 and published in pamphlet form. A useful reference is American Bar Foundation, *Annotated Code of Professional Responsibility* (1979) [hereinafter, Annotated CPR].

2. The CPR employs the term, "advocate," in EC 7-3, and most of the discussion of ethical principles in Canon 7 and throughout the CPR is in the context of this role. The CPR does recognize the lawyer's role as "advisor" in EC 7-3, 7-5 and 7-8.

3. American Bar Association, "Discussion Draft of ABA Model Rules of Professional Conduct," 48 *U.S.L.W.* No. 32 (19 Feb. 1980). See generally Kutak, "Coming: The New Model Rules of Professional Conduct," 66 *A.B.A.J.* 47 (1980). The Discussion Draft was issued for public comment on 30 January 1980 and is currently under review by state and local bar groups. It is intended to be revised and reissued in May 1981, and thereafter the subject of debate at the ABA mid-year meeting in February 1982, for possible ultimate adoption to replace the current CPR.

4. The MRPC has been the subject of much critical comment. See especially Association of the Bar of the City of New York, Committee Reports Commenting on the Jan. 30, 1980 Discussion Draft of Model Rules of Professional Conduct (NYC Bar Assoc., July 1980). The New York State Bar Association recommended the rejection of the draft MRPC on 1 Nov. 1980. See New York Bar Group Rejects Overhaul of Ethics Code, *N.Y. Times*, 2 Nov. 1980, § 1, at 45. For a critical examination of the format as well as the substance of the MRPC, see Kaufman, "A Critical First Look at the Model Rules of Professional Conduct," 66 *A.B.A.J.* 1074 (1980). Mr. Robert Kutak, chairman of the ABA Commission on Evaluation of Professional Standards which drafted the MRPC, has commented on major criticisms of the proposed text in a letter to state and local bar officials, dated 5 Dec. 1980, reprinted in "Kutak Response to Major Objections to Draft ABA Ethics Code," *Legal Times of Wash.*, 15 Dec. 1980, at 19.

on certain ethical issues confronting the American international practitioner.

The Foreign Corrupt Practices Act of 1977[5] also raises substantial technical and practical problems for the international lawyer counseling either American parent companies or their operational subsidiaries abroad. While much attention has been focused on the issues for businessmen,[6] it is obviously imperative for lawyers to reflect upon their role in assisting clients to comply with the Act and upon their own potential liability as lawyers for defective execution of their responsibilities.

Although much of this article concerns the responsibilities of the American international lawyer serving American clients abroad, either from offices in the United States or overseas, the principles enunciated in the CPR and in the MRPC relate equally to the American lawyer serving foreign clients within the United States. Further, the CPR and the MRPC provide at least some basis for examining the ethical obligations of the American international lawyer in serving American or foreign clients with regard to purely foreign transactions.

Initially this article will analyze the fundamental questions of who is the client and how the client is to be served under the CPR and the MRPC. Next there will be an examination of the Foreign Corrupt Practices Act, practical issues in satisfying its requirements, and the role of the international lawyer in counseling and assisting clients (especially where a client's employees or executives may be violating, or have violated, the law). Finally there will be an examination of the complex problems in assisting American or foreign clients where there is an issue of violation of foreign law, or where the lawyer has reason to believe that his role assists the client in attaining the fruit of a violation of foreign law.[7]

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5. Foreign Corrupt Practices Act of 1977, § 101-204, 15 U.S.C. § 78a, 1, m, n, dd, ff (1980).

6. See e.g., Atkeson, "The Foreign Corrupt Practices Act of 1977: An International Application of SEC's Corporate Governance Reforms," 12 *Int. Law* 703 (1978); Best, "The Foreign Corrupt Practices Act," 11 *Rev. of Sec. Reg.* 975 (1978); Pierce, "The Foreign Corrupt Practices Act of 1977," 8 *Int. Bus. Law.* 13 (1980); Surrey, "The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime," 20 *Harv. Int. L.J.* 293 (1979).

7. The author is unaware of any prior article dealing with the subject of ethical or professional responsibility issues in an international business law practice context. The most valuable reference source generally is the symposium, "Ethical Responsibilities of Corporate Lawyers," 33 *Bus. Law.* 1173-1586 (Special Issue March 1978), especially the following articles: Cooney, "The Registration Process: The Role of the Lawyer in Disclosure"; Ferren, "The Corporate Lawyer's Obligation to the Public Interest"; Fuld, "Lawyers' Standards and Responsibilities in Rendering Opinions"; Hoffman, "On Learning of a Corporate Client's Crime or Fraud—The Lawyer's Dilemma";

FOCUSING THE ISSUES: WHO IS THE CLIENT?

It may seem surprising to raise the question "who is the client," but in regard to the intra-corporate structure of a corporate client the answer is not always obvious. Indeed the question becomes even more complex when an American international lawyer is operating on behalf of one or more members of a group of related corporations, some American and some foreign.

Initially, guidance is provided by EC 5-18 of the CPR:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

EC 5-18, read in conjunction with surrounding sections of the CPR, is principally addressed to avoiding potential conflicts of interest between the corporate entity and some person or persons involved in its management or board.[8] In this context, it is a positive ethical principle that a lawyer originally engaged on behalf of a corporation should recognize the entity as the client, and not the person(s) who may have a conflict of interest. Members of the board or management with a clear conflict of interest should retain their own counsel.

Thus recent decisions have recognized that in a shareholder derivative action the corporate entity as such may have to engage counsel different from the customary counsel for corporate management, because some individuals in management may be involved in the alleged misconduct and corporate counsel may have been too closely associated with them.[9] Similarly it has become fairly com-

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and Van Dusen, "Ethics and Specialized Practice—An Overview of the Momentum for Reexamination."

Other provocative articles are: Daley & Karmel, "Attorneys' Responsibilities: Adversaries at the Bar of the SEC," 24 *Emory L.J.* 747 (1975); Forrow, "The Corporate Law Department Lawyer: Counsel to the Entity," 34 *Bus. Law.* 1797 (1979); Garrett, "New Directions in Professional Responsibility," 29 *Bus. Law.* 7 (Special Issue Mar. 1974); Lipman, "The SEC's Reluctant Police Force: A New Role for Lawyers," 49 *N.Y.U. L. Rev.* 437 (1974); Lorne, "The Corporate and Securities Adviser, The Public Interest and Professional Ethics," 76 *Mich. L. Rev.* 423 (1978); Morgan, "The Evolving Concept of Professional Responsibility," 90 *Harv. L. Rev.* 702 (1977); Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577 (1975); Williams, "Corporate Accountability and The Lawyer's Role," 34 *Bus. Law.* 8 (Special Issue Nov. 1978).

8. The Annotated CPR indicates that EC 5-18 as originally drafted applied only to the status of in-house counsel, and was subsequently modified to state a rule as to all corporate counsel. Supra n. 1 at 224.

9. Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209 (N.D. Ill. 1975), aff'd in part, rev'd in part, 532 F. 2d 1118 (7th Cir. 1976). Accord, Messing v. FDI, Inc., 439 F. Supp.

monplace for the board of large corporations to engage counsel for the board itself, or for an audit committee or a special investigating committee, in instances when the board or a group of outside directors determines that it must investigate allegations of management misconduct, or when the board itself fears potential liability for alleged breach of fiduciary duties or the duty of care.[10] In this context, the customary corporate counsel, whether in-house or outside, would have an ethical duty to recommend to the board the appointment of special counsel for the board or its committee, and to cooperate with such counsel when appointed.

A much more difficult question is whether a lawyer serving as outside (or in-house) corporate counsel has either the right or the duty to go beyond the executives with whom he customarily deals in order to raise matters of possible executive misconduct (or the authorization or condoning of misconduct by management), e.g., a violation of the Foreign Corrupt Practices Act. Who is the lawyer's client?

In the usual course of events, the corporate entity is represented by and may even be equated with its management, the executives with whom the lawyer is customarily in contact and from whom he normally receives requests for assistance. For the American international lawyer, such management personnel may include a vice-president-international, vice-president-marketing or other similar executives, the presidents of operating subsidiaries, or the in-house general counsel. If EC 5-18 is read expansively to cover more than traditional conflict of interest situations, the international lawyer (just like the domestic lawyer) may look beyond the corporate executive agents with whom he customarily deals to the principal, the corporate entity, to which he owes "allegiance" and whose

776 (D.N.J. 1977); Rowen v. LeMars Mut. Ins. Co., 230 N.W. 2d 905 (Iowa 1975). See generally Patton, "Disqualification of Corporate Counsel in Derivative Actions: Jacuzzi and the Inadequacy of Dual Representation," 31 *Hastings L.J.* 348 (1979); Note, "Derivative Actions,—Rowen v. LeMars Mutual Insurance Co.—Disqualification of Corporate Counsel and Appointment of Independent Counsel," 2 *J. Corp. L.* 174 (1976).

The cited cases determined the issue as a matter of law. A similar conclusion was reached in interpreting the Canons of Professional Ethics, which preceded the present CPR, in Association of the Bar of the City of New York, Comm. on Professional Ethics, Opinion 842, 15 *Record of N.Y.C. B.A.* 80 (1960).

10. The practice has become widespread as a result of post-Watergate internal corporate investigations by board of directors' committees into alleged management misconduct. Leading cases upholding the practice and decisions of such committees are Gall v. Exxon Corp., 418 F. Supp. 508 (S.D.N.Y. 1976); Auerbach v. Bennett, 47 N.Y. 2d 619, 393 N.E. 2d 994 (1979); cf. Burks v. Lasker, 441 U.S. 471 (1979). The draft Model Rules in the Comment to Rule 1.13, discussed hereafter, conclude that when there exist "serious and well-substantiated charges of wrongdoing by those in control" of a corporation, then "independent counsel should represent the directors." In an unincorporated association, as a trade union, cf. Yablonski v. United Mine Workers, 448 F. 2d 1175 (4th Cir. 1971).

interests he should keep "paramount." When the corporate entity is being badly served by its agents, who are engaged in misconduct, the lawyer would conclude that he has a right (some would say a duty) to disregard instructions from the executives with whom he normally deals and to move up the chain of corporate authority in order to serve the ultimate principal, the corporation as an entity or the shareholders as a collective group.

In practice it is of course difficult for the lawyer to discern when he may, or even must, take the step of going beyond the executive with whom he normally deals. However, his failure to recognize the duty to transcend his customary role of advising only one level of management may place him in violation of the law and of his ethical duties under the CPR. Recent instances are the celebrated *National Student Marketing*[11] and *In re Carter*[12] cases, which will be discussed at greater length below.[13]

The question, "who is the client," is thus not that easy to answer under the CPR. Some lawyers contend that EC 5-18 should not be read in an expansive fashion at all, and that there is no duty, perhaps not even a right, to go beyond the corporate management level with which the lawyer customarily deals.[14]

The draft MRPC focus upon this question in Rule 1.13, "An Organization as the Client," and articulates far more definite ethical principles than does CPR EC 5-18. The MRPC state the initial principle that "a lawyer employed or retained by an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents."[15] This

11. SEC v. National Student Marketing Corp., 457 F. Supp. 682 (D.D.C. 1978).

12. In re Carter, *Fed. Sec. L. Rep. (CCH)* ¶ 82, 175 (Mar. 7, 1979).

13. See infra, text following n. 49. See the general discussion in Annotated CPR, supra n. 1 at 283-87.

14. Harold Williams, current Chairman of the SEC, in an address at the 1978 Annual ABA Meeting, stated with reference to EC 5-18: "While the general thrust of this proposition is certainly correct, it is a statement of very limited utility to the lawyer who, as a practical matter, must deal with the corporation's officers and employees . . . how can counsel determine what is or is not in the interests of the 'entity' of which EC 5-18 speaks, as distinct from the interests of its officers, directors, employees and shareholders. I have no answers to offer for these questions." Williams, supra n. 7 at 12.

15. Ray Garrett, Jr., former chairman of the SEC, citing the "entity" language of the CPR, stated: "As I think the Commission has made clear, when it comes to matters affecting public stockholders and investors, we are not prepared to agree that the corporate lawyer's duty is solely, or even primarily, to protect the interests of the individuals constituting corporate management, when he is retained to serve the corporation . . . and to be paid out of corporate funds." Garrett, supra n. 7 at 12.

Among the serious articles raising critical comment of this view are Daley & Karmel, supra n. 7, in which the authors declare that to regard "the corporation attorney's client as (present and future) stockholders is both unrealistic and legally invalid," id. at 768, and argue that: "the stockholders have elected directors who are able to select management who, in turn, are authorized to employ all agents including law-

still leaves a certain ambiguity, since it does not make clear in what way the organization's interests may be different from those of the normal ultimate principal in a corporation, the shareholders as a collective group. Presumably the draftsmen do intend to distinguish the corporate organization from, e.g., majority shareholders or a minority controlling group of shareholders, and to indicate that the organization, as a corporate entity, may serve social interests beyond those of the controlling shareholders, i.e., interests of minority shareholders, creditors, employees and the general public, especially as investor or consumer.

The MRPC specifically indicate that a lawyer has a duty to prevent "significant harm" to the organization, or corporate entity, arising from a "violation of law" occasioned by the conduct of management or other corporate agents. The lawyer's duty then, while "minimiz(ing) disruption and the risk of disclosing confidences," is to seek reconsideration by the management persons involved, perhaps obtain an independent legal opinion, and most important, refer the matter to "higher authority" and if necessary "the highest authority" within the corporate organization structure.[16]

The Comment to this section indicates that normally referral to a higher authority implies going at least to the level of the chief executive officer, and possibly to the board of directors. In standard corporate theory, the chief executive officer, whether chairman of the board or president, is of course merely an agent of the board, but in a pragmatic appraisal of operational realities within many a corporate power structure the CEO may well be the most appropriate person to be called "the highest authority."[17] Of course the CEO or the board of directors may be implicated in the misconduct or sanction it, in which case the Comment suggests that if the violation of law is sufficiently grave, or the harm sufficiently great, the lawyer

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yers. To require attorneys to represent stockholders directly is to undermine the legal processes by which directors and officers are elected and manage." Id. at 770.

In Prof. Lorne's cogent article, supra n. 7, he argues that the ambiguities of CPR 5-18 should be resolved through identification of the board of directors as the client to whom the lawyer should look for guidance and instructions, id. at 436-38, although he recognizes that in certain situations (as merger negotiations), it would be appropriate for the lawyer to treat a special committee of independent directors as the client, id. at 477-479.

Particularly critical of any alleged lawyer's duty to report to the SEC itself is Lipman, supra n. 7, stating bluntly: "The notion that a securities lawyer owes the public a duty which overrides that owed to his client is alien to both the traditions and the ethical standards of the legal profession." Id. at 448.

16. MRPC Rule 1.13(b)(3).

17. The term, "chief executive officer," is, of course, not a legal one and does not appear in state corporation law statutes, but is the functional term used in business management parlance to refer to the senior management executive with final decision-making power.

may have a duty to advise "independent directors," if any exist,[18] and, in a close corporation context, "may be obligated to disclose misconduct by the Board to the shareholders."[19]

Moreover, the MRPC even suggest that a clear violation of law which "is likely to result in a substantial injury to the organization" may give the lawyer the right (perhaps also the duty) to breach client confidence and go to an "appropriate public authority," presumably the SEC or a public prosecutor.[20] Apparently the only appropriate alternative course of action would be to resign as counsel.[21]

This section of the draft Rules has excited considerable debate and it is quite possible that the current language will not be endorsed by the ABA. This is particularly true of the suggestion of a right or duty to report violations of the law to appropriate public authorities, rather than simply resigning and thereafter protecting client confidence.[22] Until the debate on this issue is resolved, it cannot be said that there are commonly accepted ethical principles for the lawyer as to when or whether there is a right (or a duty) to report a corporate client's violation of the law to an appropriate public authority. But it may at least be said that the MRPC show a more sensitive awareness of modern intra-corporate structure and of the responsibilities of a lawyer to the corporate entity as principal than does the current CPR.

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18. Lorne, supra n. 7 at 477, suggests the desirability of reference by corporate counsel of certain key issues to a special committee of independent directors, but notes that "the appointment of such external committees to direct counsel is not, of course, a mechanism envisioned or even authorized by current state laws." Id. at 479. In re Carter, supra n. 12, held precisely that the corporate counsel had a duty to refer to the independent directors on the board.

19. One may wonder why the MRPC stress the close corporation context, when the leading case to date, SEC v. National Student Marketing, supra n. 11, found a duty of corporate counsel to insist on a new proxy statement to the shareholders of a public corporation.

20. The best-known instance in which a lawyer went to the SEC with a complaint that both his client and the law firm which employed him were violating the securities regulations is Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. den. 419 U.S. 998 (1974), but the opinion deals with other issues and does not discuss any legal or ethical requirement upon the lawyer to act as he did.

21. The Comment to MRPC Rule 1.13 calls for a judgmental role for the lawyer in deciding among "the measures that reasonably appear best calculated to protect the client." Although the total import of the text is not absolutely clear, leaving the judgment to the lawyer would imply both that informing a public authority is permissive rather than mandatory, and that there is always an option of merely resigning from further service.

22. Illustrative of the major criticisms are the comments of the New York City Bar Association Committee on Professional and Judicial Ethics, contained in Committee Reports, supra n. 4, which argues that permitting disclosure to authorities would make the lawyer "act as judge and prosecutor to his client, would create an unwarranted ambiguity in the relationship of the lawyer to his client, undermining both the client's confidence and trust in the lawyer and the lawyer's ability to represent the client zealously." Id. at 18.

Although even the MRPC does not provide definite guidelines for the decision to move upward in the corporate hierarchy, in particular from senior management to the board, or beyond the board to independent directors or shareholders, at least the principle is set forth that the intra-corporate appeal or review procedure is a right of the outside (or in-house) counsel, and sometimes even a duty. This seems to be a desirable framework within which the modern corporate lawyer, or international lawyer, should and could operate.

If the MRPC are adopted in their present form, they would mandate upward reporting. This is important, because at the present time the lawyer who attempts to interpret the less clear rule of CPR EC 5-18 is doing so doubly at his peril: if he requests senior management or the board, or even the shareholders, to review lower executive conduct for alleged violations of law, and the client's "higher authority" deems the review inappropriate or inopportune, the counsel may lose the client account (or the in-house counsel may lose his job); if he fails to request the review, the SEC or the courts may find that the lawyer has violated his professional duties and perhaps the law as well.

The American international lawyer has a further problem. It is frequently the case that he serves principally on behalf of an operating subsidiary, either a foreign subsidiary of an American parent or a United States subsidiary of a foreign parent. He normally is requested for aid on a day-to-day basis by subsidiary management, responds to that management and is paid by the subsidiary. However, he may originally have been engaged by the parent (or its customary counsel) and be deemed by the parent to be providing counsel simultaneously to it.

The parent and its subsidiary are distinct entities. When the subsidiary is located in a different country, the subsidiary's obligation to comply with local laws may give rise to a potential or actual conflict of interest with the parent. This is apt to occur in a tax context, since the taxing authorities of both parent and subsidiary corporations generally operate on the premise that all inter-company transactions are to be conducted on an arm's-length basis. A conflict may also arise when a subsidiary must conform to local exchange control, labor, environmental protection, consumer protection or other laws, with which the parent has little familiarity and sometimes not a great deal of concern. As the parent and subsidiary are distinct entities, the international lawyer's service to both is analogous to the simultaneous service of multiple clients. This is permitted under CPR EC 5-15 and EC 5-16 provided, as stated in DR 5-105, the potential conflict is made clear and the lawyer's "independent professional judgement" is not "adversely affected." (The draft MRPC in Rule 1.8 does not modify this principle.)

The American international lawyer may serve both the parent and the subsidiary, when the subsidiary is 100% owned. Using the corporate entity analysis, if a conflict of interest ultimately arises between the parent and the subsidiary, the lawyer looks to the desires and interests of the parent as a shareholder of the subsidiary. Thus, applying the principles of EC 5-18, and the more elaborate concepts of the MRPC's Rule 1.13, the American international lawyer may properly advise and assist the parent management in its control of the subsidiary's conduct. By the same token, the American international lawyer would have the right (and presumably also the duty) to report to the parent management any instances of serious misconduct or violation of law by the subsidiary management.

When the local management of the operating subsidiary has a substantial degree of discretion in business decisions, the American international lawyer will usually deal directly with the local management and be responsive to its instructions. The lawyer may simultaneously be reporting on major matters to the parent, advising on how to comply with U.S. and local laws, and how to satisfy the arm's-length criterion on inter-company transactions. The American international lawyer may also serve a useful role in providing parent management with a sense of the local political, social, economic or cultural considerations which motivate or influence local management decisions. Should the management of the subsidiary for whatever reason no longer fulfill or be capable of fulfilling the policy decisions of the parent, the American international lawyer should, based on the corporate entity theory, abide by the instructions of the parent (except where they imply violation of local law), and if necessary assist the parent in replacement of local management, either as executives or as members of the Board of directors of the subsidiary. This would normally pose no ethical problems for the lawyer, even though he may have personal sympathy for the dismissed management.

There is a particular problem when the subsidiary is not 100% owned. It occasionally happens that there are minority shareholder interests in a subsidiary controlled by a client parent and the duty of arm's length dealings may pose particular problems in this context. Still, so long as the parent is dominant, the lawyer may continue to serve the wishes of the parent, while alerting the parent to the need for application of the fiduciary duties of a majority shareholder toward a minority shareholder under the laws of the country of incorporation of the subsidiary.[23]

23. Cf. Sinclair Oil Corp v. Levien, 280 A.2d 717 (Del. 1971), the leading Delaware opinion enunciating an "intrinsic fairness" standard as to dealings between a U.S. parent and its 97%-owned subsidiary operating in Venezuela. For a general review of American principles on fiduciary duties, see Henn, *Corporations* 465-70 (2d ed. 1970);

However, if the subsidiary is a joint venture corporation, in which the American client is either a 50-50 participant or holds only a minority interest, there is genuine reason to fear a conflict of interest if the lawyer attempts to serve simultaneously as the legal advisor of the American client and the joint venture subsidiary. It is true that under EC 5-15 and 5-16, the lawyer may, upon disclosure of such conflict, secure the authorization of his original client and the joint venture corporation to serve as counsel to both. But in practice this may prove to be extremely difficult, since at any unforseen point the original client's interest may diverge from the joint venture's. The American international lawyer may be placed in the impossible position of trying to execute normal commercial dealings on behalf of the operational joint venture subsidiary's management, while simultaneously advising his original shareholder client in a bitter dispute with the other joint venturer(s). Accordingly, it would seem generally inappropriate for the lawyer to assume the risk of serving simultaneously as counsel for both the original shareholder client and the joint venture. This may be difficult for the lawyer to accept, since most of the work may relate to the joint venture operations and any lawyer is loathe to see substantial and interesting work undertaken by another firm, but it would seem to be the more advisable professional responsibility under DR 5-105, since otherwise the lawyer's "independent professional judgement" is apt to be "adversely affected."

How Shall the Client be Served?

A. The Duty of Competence

Canon 6 of the CPR deals with the duty of a lawyer to "represent a client competently." EC 6-1 and 6-3 state this as an ethical principle, and DR 6-101 fixes the rule that "a lawyer shall not: (1) handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it."

This rule of the CPR bars the lawyer who is a generalist (or a specialist in a narrow field) from purporting to handle matters of a certain complexity in a specialized technical field, such as taxation, anti-trust, patent law, or practice before a particular administrative agency.[24] The rule is of increasing importance today when, for bet-

see also Note, "Corporate Fiduciary Doctrine in the Context of Parent-Subsidiary Relations," 74 *Yale L.J.* 338 (1965). Concepts of fiduciary limits on majority shareholders also exist in other countries, in varying degree. See Gower, *Modern Company Law* 616-30 (4th ed. 1979) on UK law; LeGall, *French Company Law* 171-76 (1974); Verrucoli, *Italian Company Law* 142-49 (1977); Wurdinger, *German Company Law* 60-62 (1975).

24. CPR EC 6-3 states that although a lawyer is deemed generally qualified by ad-

ter or worse, the number of legal specialties requiring unusual expertise is substantially greater than, say, twenty years ago. One need only mention such newly developed specialists as ERISA, employment discrimination, OSHA and pollution controls, as well as the enhanced complexity of older fields such as product liability law.

The MRPC retain this basic duty of the CPR and amplify it in some degree. The initial standard set by the draft MRPC for proper service to clients is the duty of adequate competence in Rule 1.1, which "includes the specific legal knowledge, skill, efficiency, thoroughness, and preparation employed in acceptable practice by lawyers undertaking similar matters."

A Comment to this Rule states that if a matter requires specific skills, the lawyer should either transfer it to a specialist or else make sure that he can obtain the necessary proficiency "without undue expense to the client." Later the Comment adds that: "A lawyer should undertake a matter in an unfamiliar field only with caution and upon disclosure to the client of the lawyer's degree of experience."

It is hoped that in the first instance, the domestic American practitioner, whether outside or in-house, will recognize that international practice represents precisely such a specialty as to require expert assistance on occasion, or on an on-going basis, either from an American international lawyer or from a qualified international or local counsel abroad. It is improper for an American domestic counsel to attempt to handle alone his client's international affairs when lacking the expertise to do so, simply because a matter is of substantial importance to the client (and perhaps, on a crass economic plane, capable of generating significant fees), or has a particular allure or fascination (e.g., capable of generating exciting negotiations or interesting travel).[25]

For international lawyers, this ethical duty should be fundamental. An American international lawyer should always be aware of the limits of his competence, which may perhaps be restricted to a particular geographic area. He should, in particular, never casually

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mission to the bar, he "should not accept employment in any area of the law in which he is not qualified." The CPR does not define what constitutes "competence," nor does it expressly require a lawyer to advise a prospective or actual client of the limits on the lawyer's competence, although such a duty has been implied from Canon 6. See Annotated CPR, supra n. 1 at 265. For a general view of the need to examine what constitutes "competence" in connection with specialized areas of practice, see Van Dusen, Jr., "Ethics and Specialized Practice—An Overview of the Momentum for Reexamination," 33 *Bus. Law.* 1565 (1978).

25. This naturally should not exclude the role of in-house counsel (and often customary domestic outside counsel) in providing his "inherent familiarity with corporate operations" of the client, Forrow, "The Corporate Law Department Lawyer: Counsel to the Entity," 34 *Bus. Law* 1797, at 1812 (1979).

advise on a foreign transaction without possessing or obtaining the requisite local law expertise from a knowledgeable local practitioner. Making sure that the local practitioner is knowledgeable implies that he not only understands the local law, but also the interwoven relationships with relevant American law, particularly statutory obligations placed on Americans operating overseas, e.g., export controls or foreign boycott regulations, the Foreign Corrupt Practices Act or the SEC regulatory context governing replies to auditors for consolidated financial statement purposes.[26]

On the other hand, the American international lawyer has presumably acquired a degree of expertise in dealing with foreign transactions and certain foreign legal systems which he can present to the client as specialized competence. This expertise relates as much to the manner of conducting business abroad, and the legal and regulatory framework within which such business is conducted in different countries, as it does to the specific rules of law for a given transaction. The experienced international lawyer becomes, to some degree, a cultural intermediary, assisting clients to adapt their American (or other native) mode of business to one suitable for operations in radically different social or cultural contexts.

The trained American international lawyer will also normally have acquired competence in international conflicts of law, with special attention to choice of law and choice of forum. He will have developed a knowledge of international arbitration devices, the practical use of arbitration in various contexts, and the suitability or acceptability of different arbitration tribunals and procedures. He will also be aware of standard or customary patterns of international commercial contracts, such as CIF, FOB or other sales contracts, letters of credit, international financing devices, licensing, leasing, etc. Finally, he will have some awareness of areas of public international law as they may affect private commercial or investment transactions.

This then is the expert competence which the American international lawyer should develop and which he can then offer to clients, either directly or, where appropriate, in tandem with the customary domestic counsel, who can provide his specific knowledge of the client's particular requirements and business usages.

26. Since the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (1975), the preparation of the response to auditors reviewing a client's annual financial statements has become a matter of considerable art, often demanding great care and the exercise of reflective judgment. It is accordingly both dangerous and to some degree unfair to request such a response, or letters to serve as the basis for such a response, from the customary local counsel of a foreign subsidiary, without first providing guidelines as to the implications of terminology used in such a response and the effect of the response itself.

Related to the area of the duty of competence, the draft MRPC address, in Rule 1.9, the specific subject of whether counsel (either inside or outside) should serve as a member of the board of directors of his corporate client.[27] As published by the ABA, the draft presently does not forbid the lawyer to serve as a member of the board, but rather notes the potential for a conflict between the lawyer's duties to provide independent counsel and the fiduciary and other responsibilities of a member of the board. Rule 1.9(f) requires the lawyer to refrain from serving as a member of the board if there is a "serious risk of conflict between the lawyer's responsibilities as general counsel and those as director."

The Comment to this article notes that the risk of conflict may become serious if the lawyer is "required to pass upon managerial conduct in which the directors are involved or to resolve questions in which the directors' position is potentially in conflict with that of the organization itself." Despite this potential conflict, the Comment notes that it is "often useful" that a lawyer serve as a member of the board. There is no explanation and presumably this merely reflects a widespread view that counsel as a board member can provide valuable analytic skills and awareness of legal concerns at the level of policy review by the board.[28] The inside vice-president-legal affairs or general counsel may also attain a higher level of corporate prestige and confidence by serving on the board than he would as an employee.[29]

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27. Harold Williams, the current Chairman of the SEC, has stated his definite view that outside counsel to a corporation should not serve as a member of the board, not only because of the inherent "conflict of interest problem created by the board membership of those whose income, in some significant measure, depends upon their business dealings with the management," but also because "legal counsel acting as a director may have a pre-conditioned management view," and because the attorney-director will not be able to subject proposals of his own firm "to a dispassionate and unbiased review." Williams, "Corporate Accountability and the Lawyer's Role," 34 *Bus. Law.* 7, at 10-11 (1978).

28. See Mundheim, "Should Code of Professional Responsibility Forbid Lawyers to Serve on Boards of Corporations for Which They Act as Counsel," 33 *Bus. Law.* 1507 (1978). Prof. Mundheim states the principal value to the corporation is the counsel-director's greater capacity to serve as an "informed monitor" and to become "alerted to problems early in their development." Id. at 1508. Mundheim balanced this with some of the disadvantages to the corporation of the mixed role of counsel-director, and the panel discussion following is illuminating in presenting both sides of this issue. Id. at 1509-18.

29. Harold Williams himself has drawn a distinction between the role of outside counsel and in-house counsel in this regard, and concluded that: "His expertise and access to information could well make a general [in-house] counsel a valuable addition to a board, assuming he is capable of acting with the requisite independence and freedom," Williams, "The Role of Inside Counsel in Corporate Accountability," *Fed. Sec. L. Rep. (CCH)* ¶ 82,318 (1979). A similar view is stated in Forrow, supra n. 25 at 1817 (1979): "general counsel who serves as a director gains a knowledge of and insight into the operations and plans of the corporation which better enables him to render meaningful legal advice." For a balanced view of the pros and cons of an in-

For the American international practitioner, however, it may be argued that the potential conflict is such that he should usually refrain from serving on the board of an American parent and always refrain from serving on the board of a foreign operating subsidiary. A large domestic client is not likely to request that international counsel serve on the parent company's board, unless he is simultaneously domestic counsel, but a smaller client having substantial international sales may wish international counsel on its board or that of its holding company for international subsidiaries. In view of the need for international counsel to help in the enforcement of the Foreign Corrupt Practices Act or other federal legislation or regulatory norms, however, it may well be inadvisable for the American international counsel to serve on the board, since he may need to be in a position to exercise his independent judgment on specific practices or transactions, unfettered by a conflict with the discretionary duties of a board member.[30]

It is more often the case that the American international lawyer is requested by the client to serve on a board of a foreign holding company or foreign operating subsidiary (or a foreign client may request him to serve on the board of its American subsidiary). This is often a substantial convenience to the client, who may reasonably feel and persuasively argue that he has greater confidence in the lawyer than he does in local management personnel or the standard outsiders (bankers, accountants, commercial intermediaries) who often serve on operating subsidiary boards. Nonetheless, one must assess the situation pragmatically. Except for very large operating subsidiaries, the board of directors of a subsidiary customarily serves as the executing agent for parent company decisions. The subsidiary board does not debate and decide policy freely. There is nothing inappropriate in this, so long as the parent fulfills the duty of arm's-length transactions with subsidiaries and takes into consideration relevant local political, social and economic situations.

But the American international lawyer's role should be as advisor to the parent as well as to the operating subsidiaries. He cannot do this well if he must simultaneously fulfill fiduciary duties as a member of the board. He cannot justify service on the subsidiary board as enabling him to provide analytic skills or legal concerns for policy review, because the board realistically has only a narrow mar-

house counsel-director, see Hershman, "Special Problems of Inside Counsel for Financial Institutions," 33 *Bus. Law.* 1435, 1439-40 (1978).

30. The American international counsel's role in this regard specifically exemplifies one of the reasons stated by Prof. Mundheim against a lawyer's service on the board: "A director's function encompasses making the business decision on how much risk a company should undertake. A lawyer, on the other hand, has the function to identify risk and alert decision makers of the legal consequences of risk taking." Mundheim, supra n. 28 at 1509.

gin for discretion in these matters. The lawyer's input should really be made to the appropriate executive level of the parent, where the main policy decisions are initially taken.[31] Moreover, it happens all too frequently that the lawyer may be obliged to advise the parent in the assessment of, or assist in the replacement of, the operating subsidiary's management, or even members of its board of directors. It is clearly inappropriate for the lawyer simultaneously to have a discretionary board role as well.

Finally, the lawyer may be caught in a conflict of interest, fearing personal liabilities as a board member under local law, when advising the parent on whether and how to abide by local legal norms. As a lawyer, his duty should be the careful weighing of risks for his client. There should be no prejudice to the evaluation process from fear of a direct personal liability as board member.

Of course, the suggestion that American international lawyers should not serve as members of a board of an operating subsidiary runs against the natural current of a lawyer's inclination to be of general assistance and provide services of convenience to the client. To speak bluntly, it also runs against the current of a natural selfish desire to tie the lawyer into the client's corporate structure for the enhancement of the lawyer's own prestige and the consequent development of his legal practice. But the considerations stated above should be weighed carefully by the American international lawyer and in many cases, if not always, should dictate a refusal of service on a subsidiary board. This is especially true if the operating subsidiary is a joint venture in which the American international lawyer's original client is a 50-50 partner or a minority interest. Here the original client may wish the lawyer to be on the board as a watchdog. Moreover, if the joint venture is a successful one, the lawyer may derive more legal practice from serving the joint venture than he would from occasional work in serving the geographically distant parent.

It is true that the current CPR permits the lawyer to serve both the original client and the joint venture under the conflict of interest criteria of DR 5-105, unless the lawyer's independent professional judgment would be adversely affected. But it is undeniable that there is a constant and inherent risk of a severe conflict of interest, since the original client does not have operational control of the sub-

31. An exception should perhaps be made for in-house international counsel. Often a US parent will have a member of its in-house counsel staff serve automatically as a member of the board of all its foreign subsidiaries. This serves the dual purpose of insuring that necessary subsidiary corporate legal formalities are duly observed and of alerting management to the need for review of possible inter-company conflicts of interest. Independent legal judgments when required would then be furnished by outside international counsel.

sidiary's conduct and as a result may at any time come into dispute with the joint venture partner or partners. In this context, the lawyer may be caught in a hopeless conflict between serving as independent counsel for the parent on the one hand, and serving as member of the joint venture board with fiduciary duties to all the shareholders on the other. Since resignation from the board at a time of conflict may further create the risk of throwing control of the board to the joint venture partner(s) with an interest adverse to his client, it seems always inappropriate and potentially dangerous for the lawyer to serve on a joint venture corporation's board.

B. The Duty of Zeal

At present, the fundamental standard for the service of a client is set forth in CPR Canon 7: "zealously within the bounds of the law." The concept of "zealous" service and the entire structure of Canon 7 is clearly based upon a litigation concept, even though there is limited recognition of the lawyer's role as advisor.[32]

Many lawyers traditionally have interpreted their role as one of an unswerving champion of the client's interests, with no reflection upon the propriety of the client's goals and procedures. To paraphrase the classic saying, many lawyers seem to follow the maxim: "My client right or wrong—may he ever be right, but if wrong, my client!" While this may be appropriate in defending a client in a criminal proceeding, or even in the conduct of many civil lawsuits, it seems an erroneous principle to guide the lawyer in a corporate or commercial context.[33]

The major ethical limitation placed on the duty of zeal by the CPR is contained in EC 7-5: "Never encourage or aid (the) client to commit criminal acts." By DR 7-102, the lawyer shall not: "(3) conceal or knowingly fail to disclose that which he is required by law to reveal"; or "(5) knowingly make a false statement of law or fact"; or "(7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." This provides some guide lines in a situation where it is fairly clear that the client is presently engaged in criminal violation of law or is engaged in behavior that clearly is fraudulent in either a criminal or civil context.[34] It provides no help

32. Cf. Annotated CPR, supra n. 1 at 281: "Canon 7 espouses an adversarial stance for the lawyer within the legal system. The lawyer's ethical role is to serve as the zealous champion of the cause of his or her client."

33. See the discussion of articles and general commentary contained in the Annotated CPR, supra n. 1 at 281-87.

34. Annotated CPR, supra n. 1 at 308-20. For a good discussion of the limited use of the current CPR in a corporate law context, see Lorne, supra n. 7 at 441-45. Prof. Lorne concludes: "the time has come to make a de novo examination of the role of the corporate adviser and to establish relatively specific standards for the conduct of those filling that role." Id. at 445.

in a borderline situation, and there is no suggestion that the lawyer should not assist a client whose behavior is improper but less than fraudulent or illegal (although EC 7-8 does permit the lawyer to resign if the client "insists upon a course of conduct that is contrary to the judgment and advice of the lawyer, but not prohibited by Disciplinary Rules").[35]

In international practice, the problem is exacerbated because of the quite common differences in the perception of behavior or transactions by different cultures or different legal systems. Is the lawyer's perception of fraudulent or illegal behavior to be tested by the standards of his own country or by those of the country in which the behavior occurs or the transaction will be executed, or in some measure by the standards of both countries? By analogy to international conflicts of law, is there "a proper ethical standard" for an international contract or transaction, just as there may be a "proper law"?[36]

Take the example of a corporate acquisition in a foreign country. If an American international lawyer is representing the seller (e.g., an American parent selling a foreign subsidiary), may the lawyer assist the client to conceal, or refrain from disclosing affirmatively, any or all of the following:

1. material title defect as to real property which constitutes a substantial asset;

2. advanced plans for rezoning by local municipal authorities which might well make impractical the buyer's plans for future use of real estate which is a substantial asset;

3. signature in the prior year of long term and highly beneficial management contracts with several key corporate executives of the company to be acquired, when the buyer might well wish to replace these executives;

4. local labor law principles and local government attitudes which would make it difficult, if not impossible, to carry through a substantial discharge of personnel, when the buyer clearly intends to reduce the work force substantially to attain a better profit picture.

The issue here is whether the lawyer has a duty to disclose any or all of the above in order to avoid assisting the selling client in

35. The Annotated CPR, supra n. 1 at 292, notes that an earlier draft of the present CPR would have permitted the lawyer to withdraw if "the client desires a course of conduct in a non-adjudicatory matter which is obviously unconscionable," but that this language was deleted.

36. Note that what is being examined here is not the law governing a particular contract, which may be determined in an applicable law analysis, but rather the standard to gauge the behavior of the lawyer's client, and in consequence to gauge the lawyer's own behavior.

"fraudulent" dealings with the prospective buyer. It is first of all unclear whether the concept of fraud is to be tested under American standards or local standards. Does it make a difference if the buyer is a foreign corporation or is an operating subsidiary of an American parent?[37] Suppose there is a question whether the applicable law clause in the contract should be American law or local law. May the lawyer argue for local law as the applicable law, with the knowledge that there is no duty of affirmative disclosure of a materially adverse fact under local law, when there would be under U.S. law?[38]

In analysis of the ethical problems posed by this hypothetical, it is likely that nearly everyone would agree, whether the fraud concept be American or local, that the American international lawyer should press his client to disclose any real property title defect, and presumably should resign rather than permit the client to fail to disclose this, since the title defect in a substantial asset goes to the heart of the contract and its non-disclosure should generally be regarded as fraudulent.[39]

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37. While it may be easier for the lawyer to assess the proper standard of behavior when the lawyer, his client and the opposing party (or at least its ultimate principal) come from a common American cultural pattern, and the transaction happens to occur abroad, nonetheless it would seem a doubtful principle of professional responsibility that would enable a lawyer to vary his standard of behavior depending on the cultural orientation of his client or the opposing party. This issue really leads naturally to the discussion infra, text following n. 100.

38. A lawyer may normally argue for any clause that would reduce the extent of his client's obligations or liability, e.g., an exclusion of warranties, or the choice of an applicable law that permits the exclusion of warranties, or the choice of arbitration as the sole forum to resolve a dispute. Cf. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1971), in which the Supreme Court upheld a choice of UK law and UK forum in a contract between American and German parties, even though UK law might limit the plaintiff's remedies, but noted a prerequisite that there be a "freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power." Id. at 12. See also Scherk v. Alberto-Culver Inc., 417 U.S. 506 (1974), in which the Supreme Court upheld an arbitration clause in an agreement between a US buyer and a German seller of several German and Leichtenstein entities, despite the arbitration clause's implicit ouster of Rule 10(b)5 remedies. These opinions, which give high respect to the autonomy of the parties in international transactions, would not of course govern if the contractual stipulation at issue were attained by fraud in the negotiation process.

39. The American law on fraudulent misrepresentation, and especially the extent of liability for only a partial disclosure or the non-disclosure of a material fact, has been in the process of evolution toward concepts of greater responsibility. See Prosser, *Torts* 694-699 (4th ed. 1971); Restatement (Second) Torts §§ 525-552C (1976). The Restatement Second in § 551, at 119-26, states:

> Liability for Nondisclosure
>
> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
>
> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, . . .

As to other issues however, it would be difficult to obtain general agreement, both because the question of which law tests the concept of fraud may determine the answer to some degree, and because even under American concepts of fraud, coupled with CPR DR 7-102, it is not clear whether an affirmative duty of disclosure would exist. It seems unlikely that the lawyer must press the client to reveal local governmental attitudes on labor law questions (relating to the discharge of a substantial part of the work force), since this is not so much an issue of law as of local socio-cultural patterns. But issues 2 and 3 are very much in the gray area and the present CPR standards provide no assistance whatsoever. Arguably, the American international lawyer should press his client to reveal both factual circumstances (2 and 3), because a doubt over what constitutes fraudulent conduct should be resolved in favor of the higher ethical standard, but admittedly, many lawyers would argue for nondisclosure on *caveat emptor* principles.

The draft MRPC provide many more insights and guidelines for the corporate lawyer and for the international lawyer. Indeed, it is a pleasure to read through the draft rules because they are much more readily understandable and adapted to the needs of the corporate and commercial lawyer. This is not to say that the draft Rules may not require substantial modification or that all major questions are answered. But at least substantive issues involved in the service of corporate clients are addressed, often in a very practical fashion.[40]

The draft Rules describe the lawyer's roles as advisor, advocate and negotiator, thus expanding the CPR's concentration on the advocate role. Through their review of ethical implications of the roles of advisor and negotiator, the draft Rules suggest guidelines which

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(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances would reasonably expect a disclosure of those facts.

Prosser cites title defects as an instance of facts of substantial importance to the other party whose nondisclosure would constitute fraudulent misrepresentation. Id. at 697-98.

40. The MRPC have been much criticized for abandoning the CPR's dichotomy between ethical principles and disciplinary rules in favor of a format of rules plus comments, in the style of Restatements. This new format is alleged to create greater uncertainty as to the rules themselves. See Kaufman, "A Critical First Look at the Model Rules of Professional Conduct," 66 *A.B.A.J.* 1074, 1076 (1980). Mr. Kutak, while maintaining that the MRPC format is preferable, has indicated that the ABA Commission on Evaluation of Professional Standards will disseminate both a revised draft of the MRPC and an amended version of the CPR, incorporating the substantive modifications made by the draft MRPC, so that the bar may compare the utility of the two formats. See "Kutak Reponse," supra n. 4. The present author would join the ranks of those who find the MRPC format to be much more clear and easily understandable.

can be extremely useful to the corporate and international lawyer and provide some insights that are immediately helpful.

C. The Lawyer as "Advisor"

In Rule 2, the lawyer's role as advisor is stated to be the predominant role today, which is certainly true of the American international lawyer. Providing "advice" is broader than merely the preparation of formal legal opinions and includes a review of possible courses of conduct, suggestion of contractual arrangements, structuring transactions and examination of applicable legislation or case law.

Rule 2.2 states that a lawyer should refer to all relevant circumstances in providing advice and the Comment notes that "advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or the effect on relationships with others, are predominant." The Comment also states that the lawyer, in addition to referring to the client's pragmatic concerns, may also appropriately refer to "relevant moral and ethical considerations in giving advice."

Under the CPR, there does exist a similar ethical principle. EC 7-8 contains the policy statement (although with a somewhat narrower focus):

> Advice of lawyer to his client need not be confined to purely legal considerations . . . . A lawyer should bring to bear upon [the client's] decisionmaking process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.

These principles from the CPR and the MRPC are especially relevant for the American international lawyer. Whereas the domestic lawyer may frequently assume that his client is familiar with pragmatic considerations of a social, cultural or economic character throughout the U.S., this is often not true for an American client seeking advice as to matters in a foreign country with which he is not familiar (or a foreign client seeking advice with regard to the United States). It is perhaps not sufficiently realized that the international lawyer's role is in large measure that of bridging the cultural gap between nations. The lawyer must be sensitive to the different ways of doing business in different countries and assist the client in adjusting to these different operational factors. Obviously,

the American international lawyer's capacity to do this relates intrinsically to his specialized competence discussed above.

In this context it is often inappropriate for the American international lawyer merely to state the law in a bald fashion, particularly where it is a question of foreign law. The lawyer should be sure that the client realizes how the law is implemented in practice by governmental agencies, and how local businessmen attempt to abide by it (or even tend to ignore it). Social concerns are often imperative, such as the manner in which local employees are treated in terms of hiring, work conditions and especially dismissal. Evolving standards of conduct in product liability and evolving local concerns for consumer or environmental protection are also relevant matters to be brought to the client's attention.

It is also appropriate to stress that the American international lawyer may, and often should, refer to moral and ethical considerations when local standards vary from those in the U.S., especially when conduct which is legal and ethically neutral in the U.S. may be regarded as socially irresponsible or ethically improper in a local country (even when not formally illegal). Or the reverse situation may exist—an American international lawyer advising a foreign client may have to indicate that conduct, legal and ethically neutral in the client's country, is regarded as socially irresponsible or ethically improper in the United States. After all, if the international lawyer does not provide these insights, based on his own experience or that of local lawyers, the client is often unlikely to have these concerns brought to his attention, especially at the planning stage of a transaction.

The Model Rules also provide further insights to the lawyer as advisor in dealing with issues of a client's "wrongful conduct" in Rule 2.3. The principle is stated that a lawyer shall not give advice which the lawyer can "reasonably foresee will . . . be used by the client to further an illegal course of conduct" and "a lawyer may decline to give advice that might assist the client in any conduct that would violate the law or . . . that the lawyer considers repugnant." This principle goes beyond the present CPR DR 7-102(7) prohibition of assistance in "illegal or fraudulent" conduct. Moreover, it places on the lawyer the duty consciously to evaluate what the client intends to do with the advice requested. As the Comment states: "the lawyer's professional responsibility includes making an assessment of the client's purposes and regulating the lawyer's own conduct accordingly."[41]

41. The CPR does refer to the client's state of mind, but in a more narrow context and with a pre-disposition of loyalty to the client. Cf. CPR EC 7-6: "Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences

In other words, the lawyer's duty is not simply to state the limits of the law, or to probe any gray areas of uncertain application of the law, but also to be aware that in certain instances the client may be attempting to make use of the lawyer's advice (e.g., in the form of an opinion letter, or of a plan for a complex intercorporate structure) to engage in wrongful conduct. The American international lawyer must be particularly wary of this when advising on international tax shelter arrangements, consulting on holding company and affiliated company structures, drafting instruments of trust and beneficial ownership at variance with record ownership, etc., when it is quite likely that these not only can, but may well be, used to evade U.S. or foreign income taxes, foreign exchange or investment controls, U.S. export or other trade controls, the Arab Boycott Law, or the Foreign Corrupt Practices Act.

In MRPC Rule 2.4, the lawyer is stated to have a duty to offer advice on his own initiative, if the lawyer knows that the client contemplates a course of action with a "substantial likelihood of serious legal consequences." In an international context, this would include advising an American client that conduct which he might think proper in the United States would be illegal in the foreign country or, even more often, advising a foreign client that conduct which is legal and often ethically neutral in his own country is strictly illegal in the U.S. Obvious instances include the necessity for the American international lawyer on his own initiative to advise a foreign client that American tax, antitrust and SEC regulations must be strictly respected, even though in the client's own country no such laws exist, or any laws which exist are commonly ignored, and the client's desire is to follow the pattern of his own country.

What should the American international lawyer do when he becomes aware that the client is making use of, or intends to use, the lawyer's past or present advice (including documents or corporate structures) for an illegal, fraudulent or wrongful purpose? The MRPC Comment states that "if the client's contemplated conduct is inherently wrongful and seriously harmful, the lawyer may not simply remain passive." What must the lawyer do to avoid remaining passive? Well, at least he is "free to withhold advice from a client who is determined to pursue any kind of wrongful act."

In some instances, the threat of withdrawal from service to a client who respects the lawyer may serve as a persuasive factor in inducing the client to alter his intended conduct—for example, it may persuade the client that certain laws (antitrust, tax, foreign ex-

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that vary according to the client's intent, motive or desires at the time of the action. . . . In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client."

change regulations, the Foreign Corrupt Practices Act) ought to be complied with, even though the client's natural instincts or the prevailing sentiment in his own country are to the contrary. In other instances, the American international lawyer may actually have to withdraw from further service, knowing the client is apt to persist in the wrongful or illegal conduct. Must, or may, the lawyer reveal this to any appropriate public authority? The Comment to Rule 2.3 says this is "not required," except under the circumstances of threatened "serious consequences" which permits the violation of client confidence allowed in Rule 1.7.[42] This is clearly both a difficult and delicate question, and it may perhaps best be considered below in a pragmatic context, that of the Foreign Corrupt Practices Act.

D. The Lawyer as "Negotiator"

Having reviewed the ethical implications of the lawyer's role as advisor, one can turn to the other relevant role of the lawyer covered in the draft Model Rules, that of "negotiator" in the client's interest. This too is a vital role of the general corporate practitioner and the international lawyer. It is unfortunately not a subject directly covered by the present CPR.

Just as earlier sections of the Model Rules state the principle that the lawyer may not himself engage in fraudulent or illegal conduct or abet the client in such conduct by his advice, so, likewise, the lawyer may not as negotiator assist the client in illegal or fraudulent dealings. If anything, this is an even more sensitive area than giving advice. As a negotiator, the lawyer is caught up in an adversarial context, psychologically identifying with the client's interests, and tending to stress the attainment of the client's goals, with a less detached view of the appropriate conduct as means to the client's goals.[43] The lawyer is, by the nature of his negotiating role, less a neutral appraiser of proposed or planned conduct and more initimately involved in implementing the transaction itself.

Rule 4.2 of the MRPC accordingly strikes the right note in stressing that a lawyer while negotiating has a duty to be "fair in dealing with other participants."[44] The Comment indicates that this

42. CPR EC-10 declares that a lawyer has a duty to "treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm," but that appears to be limited to a litigation context and certainly provides minimal guidance even if applied by analogy to the negotiating context. An excellent article probing the issues of ethical responsibilities in negotiation is Rubin, supra n. 7.

43. Cf. the comment of Judge Rubin: "To most practitioners it appears that anything sanctioned by the rules of the game is appropriate . . . [and] negotiations are merely a form of the game; observance of the expected rules, not professional ethics, is the guiding precept. But gamesmanship is not ethics." Id. at 586. See also Annotated CPR, supra n. 1 at 282.

44. Judge Rubin establishes two precepts: "The lawyer must act honestly and in

implies both truthfulness and the avoidance of misrepresentations or the creation of mistaken impressions. Rule 4.2(b) states:

> A lawyer shall not make a knowing misrepresention of fact or law, or fail to disclose a material fact known to the lawyer, even if adverse, when disclosure is: (i) required by law or the rules of professional conduct; or (ii) necessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client.

The Comment to this Rule notes that "the modern law of commercial transactions places duties of disclosure on sellers that go well beyond the classic rules of caveat emptor." An international lawyer, just as a corporate lawyer, generally must not only advise his client of the need to avoid fraudulent misrepresentations but also may not himself assist in perpetrating a fraud upon an adversary. This is a duty which implies more than merely refraining from giving an opinion letter which is erroneous or deliberately misleading. It also covers oral representations while bargaining on behalf of the client, and the insertion (or deliberate omission) of material clauses or written representations while drafting contracts or other instruments.

This is obviously an area of evolving ethical consideration. To state these principles is by no means to have certain guidelines in a negotiating context. There is no absolute test for materiality, for example, nor is it easy to discern the difference between the natural "puffing" which a client normally may engage in during a negotiation, and a deliberate misstatement (or omission) intended to be misleading. But at least the lawyer must pose the problem, for the client and for himself, and address the issue. To return to the hypothetical example of the sale of a foreign subsidiary of an American parent, following the principles of the MRPC would suggest that the American international lawyer in negotiating must urge his client to reveal material facts when failure to do so would be "unfair" to the adversary. Thus, it would seem clear that a title defect in real property, if the real property is a substantial asset, would have to be disclosed in a negotiation, even if the prospective buyer's counsel is so careless as not to require a warranty in this regard.[45] It is highly probable that the same holds true of pending, well-advanced local governmental plans to rezone real estate so as to make it unfit for the buyer's purposes.[46] Whether there would also have to be disclo-

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good faith," id. at 589, and "The lawyer may not accept a result that is unconscionably unfair to the other party." Id. at 591.

45. See n. 39, supra.

46. The Comment on clause (e) of the Restatement (Second) Torts § 551 suggests that the non-disclosure constitutes a fraudulent misrepresentation, if the facts in-

sure of long-term executive employment contracts of officers of the target company would depend on whether this is a material consideration for the buyer, i.e., whether the buyer has indicated a desire to replace senior executive personnel, or in the context of affairs is apt to want to replace these personnel, and the contracts would represent a significant hindrance to the buyer.[47]

It would still seem, however, that if the buyer is known to desire to reduce the work force of the acquired company, neither the seller nor the lawyer for the seller is required to provide his opinion on the difficulties such a policy might engender with local governmental authorities or with local public opinion, since these are not matters of law as such, but rather of social-cultural concern which the buyer ought to learn for himself in making international acquisitions in any country.[48]

The American international lawyer, in attempting to fulfill these principles on behalf of foreign clients transacting business in the United States, obviously confronts the delicate task of convincing the foreign client that these are appropriate standards, even if in the client's native country more classic concepts of *caveat emptor* prevail. Once again, the international lawyer must serve as a bridge over a certain cultural gap.

Rule 4.2(c) adds another useful warning note in stressing that the lawyer shall not "engage in the pretense of negotiating with no substantial purpose other than to delay or burden another party." This is an important new principle. The lawyer as negotiator has even less justification than the lawyer as litigator for using delay as a means to prejudice the adversary.

This is a particularly acute factor in international transactions, since negotiations tend to be lengthy under any circumstances. Delaying them unnecessarily may mean that the adversary is no longer able, because of time, to deal advantageously with other parties. For example, in an international transaction the client may request the lawyer to draw out the negotiations with one party in order to deal

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volved can objectively be said to "go to the basis, or essence, of the transaction, and . . . an important part of the substance of what is bargained for," as opposed to facts which are "important and persuasive inducements to enter into the transaction, but [do] not go to its essence." Supra n. 39 at 123. Judging from this text, and Illustrations 3 and 4 following the Comment, failure to disclose rezoning plans would certainly be fraudulent.

47. Based on the standards of the Restatement (Second) § 551(2)(e), disclosure of long-term executive employment contracts would certainly be in the gray area, because it is not clear whether the prospective replacement of the personnel would "go to the basis, or essence, of the transaction." Supra n. 39 at 123.

48. Although the buyer's ability to reduce the work-force may be substantially important to him, he would not normally be reasonably relying on the seller for information on governmental attitudes under "the customs of the trade" language in § 551(2)(e), supra n. 39.

secretly with another interested party until those dealings reach a point at which the deal can be made rapidly and then break the negotiation in course. In terms of the draft MRPC Rule 4.2(c), such conduct is unethical if committed by an American international lawyer.

Another example of improper conduct in this context would be negotiating with a prospective joint venture partner at great length for the sole purpose of preventing the latter from acting alone or realizing the joint venture with another party, while meanwhile the client hastens to develop its own capacity to go on the market alone.

Finally, Rule 4.3 of the MRPC parallels the express duty of Rule 2.3 (advice on wrongful conduct) by forbidding the lawyer to negotiate or conclude an agreement or assist the client in so doing when "the lawyer knows, or reasonably should know, [it] is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law." The Comment notes that a lawyer may not "participate in a sham transaction" or assist in "a transaction involving tax evasion."

For the American international lawyer this is a guideline which may involve particular difficulty. Bluntly put, many international lawyers are consulted precisely because of their expertise in structuring arrangements which resemble one transaction but are intended to achieve a different one, or because they can set up a series of holding companies and operating subsidiaries, or trust and fiduciary arrangements, to enable the client to attain a number of different ends. Now, the American international tax lawyer, as his domestic brother, has always well known that the line between counseling clients on tax avoidance as opposed to tax evasion is a delicate one. The principle here merely extends this concept to all sorts of international behavior. It is especially pertinent with regard to the new Foreign Corrupt Practices Act.

The issues become particularly difficult to resolve since the language of Rule 4.3 goes beyond prohibiting assistance in illegal or fraudulent transactions and, likewise, proscribes assistance when the client's conduct would be "unconscionable." Presumably an instance of the latter would be assisting the client in the international sale or other profitable distribution of chemical products known to be health hazards, even when there is no local law which forbids the disposition of these products.

The entire Rule 4.3 represents an appeal to the American international lawyer to exercise his conscience more frequently. It is certainly true that clients sometimes dissimulate their true goals in dealing with lawyers, particularly international lawyers, and that the lawyer accordingly may, in all innocence, develop an intricate inter-

corporate structure or draft a complex series of agreements which enable a client to carry out fraudulent or illegal activity. Often, however, the lawyer should be put on notice from the unusual demands of the client that his purpose could not be or is unlikely to be the one alleged and that the structure may conceal an illicit purpose. The new draft Rule 4.3 should suggest to the American international lawyer that, in his natural zeal to develop his practice, or his enthusiasm to be innovative in international transactions, he should nonetheless engage in some reflection about what his services may be attaining for the client.

It is of course clear that when the client at the outset divulges to the lawyer his desire to circumvent some provisions of American antitrust laws or the Arab boycott legislation or the Foreign Corrupt Practices Act, and the lawyer cannot find a solution which is arguably avoidance and not evasion, then the lawyer must refrain from further assisting the client if the client persists in the unlawful course of conduct.

This conclusion is required as a present ethical standard by CPR EC 7-5: "a lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor." This is true even if the lawyer's sole function is to develop a structure abroad (e.g., holding companies in a tax haven and related companies in other countries, or a series of trust or fiduciary instruments) which in itself is neutral, but which the lawyer may reasonably presume to be intended to be used illicitly.

This article has so far posed the questions, "who is the client" and "how is the client to be served," in the context of the present ethical standards of the CPR, and the much more useful but still merely proposed ethical standards of the MRPC, and has then tried to elucidate certain general rules of conduct for the American international lawyer. Though these general conclusions will not be accepted by everyone, it is hoped that at least posing the issues will stimulate further reflection.

THE FOREIGN CORRUPT PRACTICES ACT

To place this examination of the professional responsibilities of the American international lawyer in context, it seems appropriate to review them in light of the Foreign Corrupt Practices Act of 1977.[49] The Act is, of course, the consequence of numerous SEC investigations of bribery and related conduct engaged in as a matter of course during the 1960s and early 1970s by many American corpora-

49. 15 U.S.C. §§ 78a, l, m, n, dd, ff (1980) [hereafter the FCPA or the Act].

tions in their overseas operations.[50]

In the post-Watergate political climate, Congress saw fit to embody in the FCPA what it felt to be appropriate ethical standards for businessmen operating overseas. Unfortunately, the Act bears all the earmarks of hasty drafting, imprecision and somewhat confused coverage.[51] Even the businessman who might agree entirely with the ethical goals of the FCPA may find it difficult to understand how to adjust his conduct in order to comply in practice.[52]

This problem is exacerbated by the fact that many American businessmen quite frankly do not agree with the standards set down in the FCPA, or feel that it is inappropiate to hold them to standards which businessmen in other parts of the world do not follow. Indeed, it would seem fair to state that many businessmen feel that what might be reprehensible conduct in the United States is ethically neutral by local standards in other parts of the world. American businessmen with substantial international stakes fear that to be held to the standards set forth by the Act, while European, Japanese or Latin American competitors are bound by no such standards, may simply have the result that business opportunities will be lost to competitors.[53] The SEC has been sufficiently sensitive to this

50. The historical genesis of the FCPA is discussed in Surrey, supra n. 6 at 297. Articles reviewing the SEC's attempt to deal with the problems raised by foreign bribery prior to the FCPA include Baumeister & Cohen, "Foreign Bribery by American Multinational Corporations," 2 *Del. J. Corp. L.* 207 (1977); Lowenfels, "Questionable Corporate Payments and the Federal Security Laws," 51 *N.Y.U.L. Rev.* 1 (1976); Stevenson, "The SEC and Foreign Bribery," 32 *Bus. Law.* 53 (1976). By 1978, more than 400 American corporations had admitted making questionable or illegal payments abroad, with a total in excess of $300,000,000. McCoy & Griffin, "Illegal Payments Abroad," *Legal Times of Wash.*, 30 Oct. 1978 at 8.

51. As Surrey notes: "The Foreign Corrupt Practices Act . . . . represents what can result when The White House reverses signals at the last minute and when members of Congress, the administration and the business community are unwilling to challenge a draft law for fear of being accused of being in favor of that which the law seeks to prohibit. The Act is not polished legislation." Supra n. 6 at 296.

52. See "Misinterpreting the Antibribery Law," *Business Week*, 3 Sept. 1979 at 150, which observes that many companies are trying to follow the law but find it difficult to "feel out the line between permissible and unlawful payments." Id. at 151.

53. See Goldstein, "European Views of United States Anti-Bribery and Anti-Boycott Legislation," 1 *Nw.J. of Int. L. & Bus.* 363 (1979), stating that no European nation makes it a crime to commit bribery in a foreign country. Id. at 364. He also observes that "most of the free world's exporters and overseas contractors feel it necessary to make payments to government officials in developing countries. This is considered to be an ordinary cost of doing business in these countries. This view, which undoubtedly accurately reflects business reality in the third world, has been widely disseminated throughout the press." Id. at 365. Cf. Bogdan, "International Trade and the New Swedish Provisions on Corruption," 27 *Am. J. Comp. L.* 665 (1979). See also Surrey, supra n. 6 at 300: "No other capital exporting country has followed [the example of the FCPA] . . . , and reports reveal instances of United States corporations losing business to those whose national legislation does not include a world-wide moral code with criminal penalties for violation." Then Assistant Commerce Security Frank Weil was quoted in "Antibribery Law Uncertainties Persist, Despite President's Call

complaint that in 1980 it undertook an investigation of the problem.[54] The White House also instituted a review of the possible negative impact on US export trade resulting from compliance with the FCPA, centering on business concern with alleged ambiguities in the Act.[55]

The American international lawyer (and particularly the in-house international counsel) may perhaps share some of the sentiments of businessmen in feeling that the FCPA either does not represent the appropriate standards for international conduct or that it represents appropriate ethical standards but unrealistic legal ones. This is however essentially irrelevant because the FCPA is statutory law and must be respected. Although there is a good possibility of amendment to eliminate some of its ambiguities, there is little likelihood of its repeal.[56] The Justice Department has created a procedure for reviewing questions of businessmen's proposed conduct in terms of the law, but the Department certainly does not have much leeway for mitigating interpretation of the statutory language.[57]

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for Clarification," *Wall St. J.*, 30 May 1979 at 12 as stating that "American exporters are losing numerous overseas opportunities."

54. The SEC issued a release requesting public comment on the impact of the anti-bribery prohibitions, with comments to be received by 30 June 1980. SEC Rel. No. 34-16593, 45 *Fed. Reg.* 12,574 (Feb. 26, 1980).

55. See U.S. Dept. of Commerce, *Report of the President on Export Promotion Functions and Potential Export Disincentives* (1980). The Report states: "Some in the business community have expressed their uncertainty about what conduct is prohibited and what conduct is not prohibited by the FCPA. Because of this uncertainty, some businessmen say that they are acting with a degree of caution that is resulting in the needless loss of exports." Id. at 10. The Report indicates that the President had requested the Justice Department and the Commerce Department to continue to assess the FCPA and to report by 1 Mar. 1981. Of great interest is the extended discussion prepared by the Executive Branch of various ambiguities in the Act, in the Review annexed to the Report. Id. at 9-1 to 9-11. The Review bluntly states that the FCPA "is identified by businessmen and attorneys as one of the most significant export disincentives." Id. at 9-1.

56. President Carter stated that he might support amendments to eliminate ambiguities in the law, but that he would oppose "any amendments which would weaken the Act's proscription of bribery or which would result in loopholes for bribery of foreign government officials." *Report*, supra n. 55 at 11. It remains to be seen what will be the attitude of the Reagan Administration.

On 4 June 1980, Sen. Roth, joined by 24 other senators, introduced a Bill to Establish a National Export Policy for the United States, which would, among other things, amend the FCPA to clarify certain ambiguities and require the Justice Department to issue guidelines for application. S.2773, 96th Cong., 2d Sess. (1980). See also "Foreign Bribery Law Amendments Drafted," 66 *A.B.A.J.* 135 (1980). Repeal has been urged in Pierce, "Should the FCPA Be Amended or Repealed," *Legal Times of Wash.*, 7 Jan. 1980 at 12.

57. By a Rule of 20 March 1980, the Justice Department instituted a review procedure by the Criminal Division, permitting any interested party to seek a statement of the Department's enforcement policies under the FCPA concerning proposed business conduct. The review procedure has been sharply criticized as apt to provide answers only for simple cases, unlikely to provide any guidance for hard cases, and creating a record for other interested agencies (notably the SEC) to investigate and conceivably prosecute parties who make use of the procedure in good faith. See Sur-

The heart of the FCPA is prohibition of bribery of foreign public officials. The Act forbids payments, authorizations of payment or offers or promises to pay anything of value to a foreign official in a corrupt fashion, so as to influence any discretionary act or decision, or to have him utilize any influence with his government. There is a business nexus, because the decision or influence must relate to obtaining or retaining business for the person offering the payment or for anyone else. Payments to political parties are treated analogously to payments to public officials.

Furthermore, as an obvious necessity, indirect payments via any intermediary to a foreign official are likewise prohibited. The language is however somewhat stricter here. While payments to a foreign official must be "corruptly" made, which certainly implies knowing conduct and an evil intent, payments to any intermediary are prohibited whenever one knows or has "reason to know" that the intermediary will transmit a payment to a foreign official. Arguably, payments to an intermediary do not have to meet the standards of scienter.

An exception was written into the law to permit payments to foreign officials "whose duties are essentially ministerial or clerical." The legislative history provides some but not much guidance as to what that is intended to mean.[58]

A dramatic feature of the FCPA is that it covers not only companies quoted on the stock exchange or otherwise subject to the jurisdiction of the SEC, but also all so-called "domestic concerns," a term defined to mean every individual, partnership or corporate enterprise whose principal place of business is located in the United States. This means that every domestic corporation is subject to the duties and potential sanctions of the Act. In terms of the defined language, the only exception is for foreign subsidiaries of an American parent, and even they cannot be used indirectly to do what the American parent cannot do directly.[59]

The sanctions are severe: a corporate entity can be fined $1 million for violation of the law; officers or agents can be fined $10,000

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rey & Popkin, "Review Procedure Least Desirable Aspect of FCPA," *Legal Times of Wash.*, 14 Apr. 1980 at 10.

58. S. Rep. No. 114, 95th Cong., 1st Sess. (1979) provides as illustrations of permitted "grease payments": "payments for expediting shipments through customs or placing a transatlantic phone call, securing required permits, or obtaining adequate police protection . . ." Id. at 10.

59. The U.S. parent should have "no knowledge of the payment," and cannot pursue a policy of deliberate ignorance. S. Rep., supra n. 58 at 11. The Report adds (as to companies subject to the SEC accounting requirements): "Under the accounting section no off-the-books accounting fund could be lawfully maintained, either by a U.S. parent or by a foreign subsidiary, and no improper payment could be lawfully disguised." Id.

and/or imprisoned for five years. If anything, it is the potential criminal responsibility of senior executives which puts the most substantial bite into the Act and will engender a high degree of prudence on the part of corporations in trying to comply.

For the long term, perhaps the most important aspect of the Act is its creation of new accounting requirements for companies under the SEC's jurisdiction (but not other "domestic concerns"), because these requirements are general and not specifically related to the problem of foreign corrupt payments. Thus an entity subject to the SEC regulations must keep books, records and accounts that "in reasonable detail . . . . accurately and fairly reflect transactions and . . . assets." Moreover, a system of adequate internal accounting controls must be established to assure this goal.[60]

This undoubtedly will have a more substantial impact than the bribery sections, because these requirements must be complied with as to all domestic as well as foreign business. It is the first time Congress has seen fit to lay down such standards.[61] The international lawyer will of course be involved in working with corporate executives and outside auditors in the establishment of the proper internal accounting control system as to foreign transactions, or for the control of foreign subsidiaries.[62] This is no easy task, especially since it is not clear precisely how far the internal accounting controls must be analogously replicated as to foreign operating subsidiaries.

Nonetheless, the principal focus of the international lawyer will be with regard to assisting the client to conduct its foreign operations within the limits set down in the bribery sections. Unfortunately, almost none of the difficult questions of interpretation have been answered to date.[63] It is useful to review some of these deli-

60. The SEC has supplemented the FCPA accounting requirements with Rules 13b2-1, forbidding falsification of accounting records, and 13b2-2, placing direct responsibility for accuracy on directors and officers of issuers. SEC Rel. No. 34-15570, 44 *Fed. Reg.* 10,964 (Feb. 23, 1979).

61. For a general review of the accounting requirements, see Goelzer, "The Accounting Provisions of the FCPA—The Federalization of Corporate Record-keeping and Control," 5 *J. Corp. L.* 1 (1979). All of the big eight accounting firms have their own manuals on the accounting requirements.

62. See S. Rep., supra n. 58 at 8: "The accounting profession will be expected to use their professional judgment in evaluating the systems maintained by users. The size of the business, diversity of operations, degree of centralization of financial and operating management, amount of contact by top management with day-to-day operations, and numerous other circumstances are factors which management must consider in establishing and maintaining an internal accounting controls system."

63. Many issues of interpretation of doubtful provisions of the FCPA, as indicated by businessmen, are set forth in the Review of the Executive Branch, supra n. 55 at 9-3 to 9-8. Cf. the questions raised in Atkeson, supra n. 6 at 717-19, as well as the discussion of hypothetical cases in Solomon & Gustman, "Questionable and Illegal Payments by American Corporations II," *J. Bus. L.* 146 at 147-51 (Mar. 1980).

cate issues.

Can any payments to foreign officials be made in a "non-corrupt" manner? Is it licit to give gifts which under local customs are deemed usual and without commercial connotations to the local sovereign or other officials on birthdays, holidays, etc.?[64] When does reasonable entertainment become so expensive or unusual as to constitute a corrupt payment?[65] To what extent is extortion a justification for a foreign payment?

As to the distinction between foreign officials with discretion and those which are essentially "ministerial or clerical," what relevance has their standing in the local governmental hierarchy? May a more senior official ever be engaged in strictly ministerial tasks? Don't even lower officials have mixed discretionary and ministerial functions, e.g., the Customs inspector not only can facilitate speed in clearing Customs, but also fixes valuation; the Immigration officer not only can accelerate the granting of a visa routinely, but also often has discretion to determine whether a visa is to be granted at all.

In this context, is the amount of the payment at all relevant, either absolutely or in proportion to the value of the transaction?[66] Is the amount to be judged by American standards or by local standards, e.g., a $1,000 payment for an allegedly ministerial execution would be regarded as quite substantial in the United States but possibly not out of line in a Mid-Eastern country.

With regard to the use of intermediaries, to what degree does the American businessman have a duty of investigation and verification?[67] May he rely upon representations or affidavits by the commercial intermediary that no payments are being made to foreign officials? Or must the American businessman engage in surveillance, or demand legal or accounting controls over the intermediaries' operations? May the businessman ever pay substantial amounts to international intermediaries when he would not pay corresponding amounts to a domestic intermediary?

What about foreign subsidiary transactions? To what degree

64. See Review of Executive Branch—Potential Export Disincentives, supra n. 55 at 9-6.

65. Not only is there doubt about unusually lavish business expenses, but it is even possible that, strictly construed, the FCPA may forbid even "reasonable" entertainment expenses. See Solomon & Gustman, "Questionable and Illegal Payments by American Corporations," *J. Bus. L.* 67 at 74 (Jan. 1980).

66. The question also has been raised whether a large payment to a low-level customs official may be permitted, when a much smaller payment to a high-level customs official would be forbidden. See Review of Executive Branch, supra n. 55 at 9-6.

67. The extent of liability for the use of foreign agents is apparently regarded as the most difficult part of the FCPA to apply. See Review of Executive Branch, supra n. 55 at 9-5.

must a parent actively verify subsidiary management's operations in this regard? Are the same standards required when it is a joint venture subsidiary with most management control left in the hands of the foreign joint venture partner?

All of the above questions, and many others, remain open today, and any attempt to answer them must be largely speculative.[68] The new Justice Department review procedure is not to date proving of any significant assistance in this regard.[69] Any future amendments to the Act may eliminate some areas of doubt, but others will remain[70]—and it is by no means certain that Congress will find itself able to amend a law which purports to set high standards of American business ethics.

Thus the American businessman is confronted with the need to comply with the FCPA now and in the indefinite future. The American international lawyer must accordingly use his best efforts in advising businessmen in an attempt to set up internal corporate codes of conduct and rules of procedure in order to comply with the FCPA,[71] to resolve doubtful questions of application, as well as in trying to deal with the legal consequences when instances of suspected violations may occur.

It is in this context that the previous discussion of the international lawyer's ethical responsibilities under the present CPR and the draft MRPC become relevant.

It is first of all clear that the American international lawyer cannot assist a businessman in deliberate evasion of the law, even if the businessman in good faith believes that law to be inopportune or economically disastrous. The international lawyer is not permitted, by the present CPR, DR 7-102, to assist the client in conduct the lawyer knows to be illegal. Thus, the lawyer may not help the client create

68. For an able discussion of some issues, see the summary of a panel held at the 7 Aug. 1978 ABA Annual Meeting, printed as "Foreign Corrupt Practices Act of 1977 and the Regulation of Questionable Payments," 34 *Bus. Law.* 623 (1979). See also Best, supra n. 6 at 979-81.

69. The Review of Executive Branch, supra n. 55 at 9-8 to 9-9 states that businessmen do not believe the review procedure will be useful, because of concern for protection of confidential information and avoidance of adverse publicity, the uncertain precedential value of the Department's statements, and the failure of the SEC to join in the procedure or be bound by the results. It does not appear that great use is being made of the review procedure, and the first four reported responses did not deal with any difficult issues. See "Justice Issues First Responses under FCPA Business Review Procedures," *Sec. Reg. & L. Rep. (BNA)* No. 577, at A-1 (Nov. 5, 1980).

70. The Roth bill, supra n. 56 at § 525, makes certain definitions which are intended to permit courtesy gifts and reasonable marketing expenses, and it would also permit all payments to foreign officials in countries whose laws do not forbid such payments, but the bill would not cover the other areas of uncertainty.

71. See Ferrera, "Corporate Board Responsibility under the FCPA," 18 *Am. Bus. L.J.* 259 at 261-62 and 266-67 (1980). For a good discussion of house counsel's role in aiding compliance with the FCPA, see Forrow, supra n. 7 at 1806-08.

paper corporate vehicles whose only use can be to conceal illicit transactions; may not draft agreements with commercial intermediaries when there is "reason to know" that the intermediary will in fact make foreign payments; and may not assist the client in negotiations with foreign commercial parties when a known part of the bargain is an illegal payment, whether direct or in some form of commission or profit share to foreign officials.

Moreover, it would likewise be unethical for the international lawyer, knowing of the client's desire or intention to subvert the FCPA, to state to the client that he, the American international lawyer, cannot directly assist, but to recommend a compliant foreign attorney or a friendly Swiss banker who can take care of the matter.[72]

The American lawyer may, of course exercise his reasoned legal judgment in advising the client in the gray area issues which have been indicated above. If, for example, the lawyer believes that payments can be made to a lower-level official for execution of ministerial duties, there is no reason he cannot provide his opinion to this effect, even if subsequent events indicate that the opinion was wrong, either because of erroneous underlying facts or because of a different interpretation subsequently reached by the SEC or the courts.[73] The lawyer may also exercise his judgment in advising the client whether or not to make use of the Justice Department's review procedure, weighing the likely ultimate utility of such guidance against the disadvantages resulting from disclosure of the proposed conduct to the Department.[74]

On the other hand, the draft MRPC's admonition in Rule 2.3 that the lawyer has a duty as advisor to make an assessment of the client's purposes, and in Rule 4.3 that the lawyer, in negotiating or drafting, cannot assist in a sham transaction, are clearly quite relevant.

Often an American international lawyer will come to realize that the client, or certain key executives in the client's corporate hierarchy, has no intention of complying with the FCPA and is searching for means of evasion. At that point, if the MRPC standards are followed, the lawyer should properly refrain from further investigation

72. See the Comment to MRPC 2.3: "the lawyer is required to avoid furthering the [client's illegal] purpose by suggesting, for example, how it might be concealed."

73. CPR EC 7-3 draws a distinction between the conduct of the lawyer as an advocate, when he "should resolve in favor of his client doubts as to the bounds of the law," and the lawyer as an advisor, when he "should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law." Hence, under the present CPR, the lawyer advising his client on FCPA matters cannot simply construe any ambiguities in the client's favor, but must strive for a balanced opinion that would have a reasonable chance of being sustained by the courts, if the issue were ever presented to them.

74. Supra n. 57.

of a purported gray area, or from drafting documents with an ostensible justifiable purpose when he believes the client is masking an ulterior and illicit purpose. This might occur when a client is dealing with a commercial intermediary allegedly on a proper basis, but the lawyer casually overhears comments which suggest that the intermediary's real role is to ensure the execution of illicit foreign payments. It can also occur that the size and method of the payments (abnormally high up-front commissions, or surprising last-minute bonuses) will call the lawyer's attention to the high degree of likelihood that these payments are not normal commercial payments but rather are intended to go to foreign officials. Again, the lawyer may become aware that the intermediary has a local reputation as a "go-between" or "fixer," when that connotes bribery.

At the very least it would seem that the lawyer's ethical responsibilities would require him to refrain from further assistance on the matter, and quite possibly to resign from any continued service to this particular client.[75]

When the American international lawyer knows or has strong reason to believe that a corporate executive of a client is presently engaged in a violation of the FCPA, whether or not the lawyer has been assisting on the transaction, the issue arises whether the international lawyer has a duty to report this to higher corporate levels. Under the present CPR, EC 5-18, the lawyer understands that his ultimate client is the corporate entity, not the executives. The draft MRPC makes this even more precise in its proposed Rule 1.13.

It is not clear from the CPR whether the lawyer has a duty to report to higher levels of authority (although presumably he has always the right to do so). The MRPC in Rule 1.13(b) states that the duty exists when there is not only a violation of law but also a risk of significant harm to the client. Certainly, the potential fines, jail terms and adverse publicity resulting from a violation of the FCPA would lead the international lawyer normally to conclude that there is such a risk of significant harm to the client and he has a duty to report to higher levels.

Usually, this would mean going to higher management levels and perhaps the office of the chief executive himself. Conceivably, it might mean reporting the matter to the Board of Directors or a committee of independent directors on the Board, or even, in the case of a close corporation, to representatives of majority or controlling

75. This would seem clear under MRPC Rule 2.3. The Comment notes that a lawyer is not supposed to encourage "a client's belief in the possibility of getting away with a serious deliberate wrong." The conclusion would also seem to follow under the present CPR EC 7-5, which forbids the lawyer to "encourage" as well as to aid the client in the commission of "criminal acts."

shareholders.[76]

It is a clearly relevant consideration that the SEC takes the position that a lawyer may violate not only ethical standards but also the law if he fails to report SEC violations to higher authorities within a corporation. This is evident from the recent and controversial SEC administrative decision, *In re Carter*.[77] Messrs. Carter and Johnson, partners in a New York firm, were deemed to have aided and abetted corporate management in violating Rule 10(b)5 and other regulations when they assisted management in filing 10K, 8K and other reports, and in making press releases and communications to shareholders, without properly disclosing the grave financial weakness of the company.

In this decision, the SEC administrative judge indicated that the proper course of conduct should have been to report to the independent outside directors on the board both the financial weakness and the reluctance of management to disclose the situation. The opinion, interestingly enough, also discussed at some length the partners' violation of CPR EC 5-18 in considering the appropriate penalty to be imposed. The decision is being appealed to the full SEC Commission and has created considerable anxiety among members of the SEC bar.[78] Even if reversed as to the facts, the decision is important as an indication of SEC policy, which, of course, would likewise be applicable to international lawyers who fail to report FCPA violations to higher corporate authority.

A leading recent federal decision in this context is *National Student Marketing*,[79] passing on the violations of SEC regulations, notably Rule 10(b)5, by members of the well-known Chicago firm of Lord, Bissel and Brook. This firm represented a company which was acquired by National Student Marketing. The court held that the attorneys for the acquired company had themselves aided and abetted the fraudulent conduct by failing to urge their client's management and directors to re-submit the issue of consent to acquisition to the client's shareholders, once the probable loss position of the acquiring company (National Student Marketing) had been revealed by Peat, Marwick, Mitchell. This is then a precedent for the

76. See supra, text at and following n. 11-22.

77. Supra n. 12.

78. Cf. "Whom Does the Lawyer Serve," *Business Week*, 17 Dec. 1979 at 104. The case was argued on 11 Dec. 1979 and, for whatever reason, the decision of the SEC Commission has still not been rendered.

79. SEC v. National Student Marketing, supra n. 11. For a provocative discussion of the various court decisions in this affair, see "Patterson, The Limits of the Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisisted," 1979 *Duke L.J.* 1251 (1979). A good student discussion is Note, 65 *Va. L. Rev.* 1137 (1979). See also the discussion in Hoffman, supra n. 7 at 1400-10, and the extensive bibliography of direct and indirect commentary at 1404 n. 38.

view that the international lawyer has a duty to report FCPA violations to higher, and even the highest authority, within his client's corporate structure.

Although *National Student Marketing*[80] is an unappealed (and unappealable) federal district court decision, and *In re Carter*[81] is an SEC administrative decision under appeal, they certainly indicate SEC policy on the matter. The issue is still open, and lawyers may still differ as to whether there is a duty to report legal violations or fraudulent conduct to higher authority within the client. The draft MRPC would certainly suggest there is such a duty and many lawyers (including the writer) would agree.[82] Others may not, but even they must be aware of the personal risks they may run, in view of SEC policy, in failing to report to higher authority.[83]

Concluding, therefore, that it is at least a right, and probably part of the American international lawyer's responsibilities, to report violations to senior management (and more rarely to the board, or outside directors or the shareholders), the practical question arises as to when and how this can be carried out. The issues here involve not only the professional responsibility of the lawyer, but also pragmatic considerations of dealing with management or the board, helping to carry out an effective investigation of relevant circumstances, and the exercise of due care to be sure that all communications with the client remain privileged to the maximum degree possible.[84]

Assume first a relatively easy case, in which the American international lawyer in the course of representation of the client has become aware of, or been consulted upon, proposed future conduct raising FCPA issues or relatively minor past conduct which may have constituted an FCPA violation. Concern for the client privilege would exist, but is not apt to be paramount because the conduct has either not yet occurred, or prima facie is not serious in nature.

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80. Supra n. 11. The text discussion is technically dicta, since the court did not impose any penalty upon the lawyers involved, and for that reason the decision was also not appealable.

81. Supra n. 12.

82. Cf. "Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979)," 35 *Bus. Law.* 605 at 613 (1979): "There is no doubt that there are circumstances in which counsel, in order to fulfill his or her responsibilities to the client entity, should report directly to the board or one of its committees." The Committee however rejected the so-called Georgetown Petition proposal, upon which comment was requested, because it would too broadly mandate all attorneys to report annually to a corporate client any instances of management misconduct of a substantial character.

83. Cf. Solomon, "The Corporate Lawyer's Dilemma," *Fortune*, 5 Nov. 1979 at 138.

84. A very useful article in this area is Block & Barton, "International Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel," 35 *Bus. Law.* 5 (1979).

Under this hypothesis, the lawyer should first make known the relevant circumstances and legal issues to the middle management executives with whom he is customarily in contact, perhaps the top management of an overseas subsidiary, or perhaps an international vice-president in the U.S. The initial discussion would preferably be oral to allow for greater freedom in reviewing all relevant elements and concerns, as well as to avoid building a record which may contain unverified surmises or an inaccurate presentation of facts. If the international lawyer has the practical possibility of dealing directly with in-house counsel, in-house counsel should be contacted before or at least simultaneously with the middle management executive involved.

The desired end result, in the case of proposed conduct, would be a careful legal examination of the relevant factors followed by a recommendation either to execute the conduct, perhaps in modified form, in a manner which is reasonably deemed to be in compliance, or else not to execute the conduct at all. In the case of relatively minor past conduct, the desired end result is a determination of the extent of a violation, if any, prescribing internal corrective action to prevent continuation or reoccurrence, and perhaps development of more general codes of conduct or guidelines for the future.

Now assume that the circumstances are much more serious. This may be because middle management persists in wanting to carry out conduct which the international lawyer thinks would violate the FCPA, or because middle management does not want to take corrective action on past conduct, or because past conduct is not minor but so serious as to involve possible substantial injury to the client. Furthermore, the international lawyer has reflected upon his professional responsibility and concluded that he ought to refer the matter to senior management or perhaps the board. How is this to be done?

The *Corporation Director's Guidebook*, prepared by the ABA Committee on Corporate Laws, provides general concepts and standards for the use of modern corporate directors. Regarding compliance with law, the *Guidebook* suggests "that all lawyers rendering legal services for the corporation have a direct channel of communication to regular corporate counsel so as to assure that failures of compliance will be promptly brought to his attention and, in appropriate cases, by regular corporate counsel to the chief executive officer, in order to permit corrective steps to be taken."[85]

A sensible course of action would therefore seem to be to contact the most senior in-house counsel or the outside domestic gen-

85. "Corporate Director's Guidebook" (Revised Edition/January 1978), 33 *Bus. Law.* 1595 at 1610 (1978).

eral counsel, especially if the latter participated in engaging the international lawyer. (It may not be appropriate to contact the outside general counsel however, when the international lawyer has no reason to believe that the latter would be charged with this specific representation of the client's interests, as for example when it could be expected that a special counsel might be designated.)

Contacting the general counsel, whether in-house or outside, may be pragmatically useful when the international lawyer does not really know what person in senior management would be most appropriate to handle the issue, which might well be the case if the international lawyer is resident abroad and customarily deals with subsidiary management. Moreover, it is useful in that the general counsel is much better placed to judge when the issue would require urgent presentation to the board or outside directors on the board. Finally, contacting the general counsel, especially the outside general counsel, may be desirable when it is imperative to protect privileged communications to the maximum extent possible.

If consultation with an in-house lawyer or outside domestic counsel is not feasible, the international lawyer should move directly to the chief executive officer or the most senior management person he can contact. The initial contact might best be oral. The reason is simple. Presently pending before the U.S. Supreme Court is the *Upjohn*[86] case, which poses a clash between circuits as to whether lawyers' communications are privileged only when provided to a small group of controlling management, or also when provided to lower executives duly authorized to receive them in terms of subject matter.[87] Until the Supreme Court passes on this issue, and, indeed, if it decides in a way favorable only to the control group theory, the international lawyer will place the corporation in jeop-

86. United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 445 US 925 (1980), on which argument occurred before the Supreme Court on 5 Nov. 1980. Upjohn's vice president—general counsel, who was also a director, conducted an investigation into questionable payments allegedly made to foreign officials by some of its overseas subsidiaries. In the investigation, Upjohn and subsidiary personnel provided confidential data to the general counsel, especially in replies to certain questionnaires. Upjohn indicated the basic results of its review to the SEC. The IRS then instigated a criminal investigation of Upjohn's tax returns and sought to subpoena the questionnaires were at too low a level to be in any "control group" and that the privilege should only be given to communications to a "control group."

87. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd without opinion by an equally divided Supreme Court, 400 U.S. 348 (1971), had held that the attorney-client privilege covers legal communications with lower employees whenever the employee is acting in the course of his employment and at the direction of his superior. The leading recent decision in this sense is Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc), which confirmed this rule but eliminated routine reports and communications concerning business rather than legal advice. See Note, "The Attorney-Client Privilege, the Self-Evaluative Report Privilege, and Diversified Industries, Inc. v. Meredith," 40 *Ohio St. L.J.* 699 (1979).

ardy unless he communicates only with the most senior management level and in a manner designed to maintain the privilege.[87a]

Similar considerations dictate that the American international lawyer should not contact outside auditors unless and until the board of directors or senior management feels it is necessary for the outside auditors to be involved, in light of possible loss of the privilege[88] and the risk of potential liability in shareholders derivative actions or under the SEC laws. Outside general counsel or house counsel should determine the timing of the international lawyer's contacts, if any, with the outside auditor.

In the event that international counsel's raising of FCPA issues leads to an investigation, as has often been the case in the past, this must be carried out with great care.[89] Sometimes it will be carried out by outside or inside general counsel, but often by a special counsel.[90] The international counsel may then effectively cease dealing with his normal management contacts, and refer all matters relevant to the inquiry to the general counsel or special counsel. The international lawyer may have a key role to play in providing special expertise on the foreign governmental or legal structure involved, on the nature of related business dealings abroad, and in the coordination of local lawyers or special outside auditors dealing with the subject matter of the inquiry.[91]

All of the above discussion has assumed that responsible senior management, alone or under board direction, has decided to react seriously to the report of the international lawyer. What should be done if recourse to senior management is unavailing? At this point, the international lawyer may have to choose among acquiescence, resignation from further service to the client, or moving up the ladder to the board of directors or perhaps to outside independent members of the board. Until the SEC's viewpoint receives authoritative sanction by the courts, some lawyers may perhaps prefer to acquiesce or to resign, in the belief that their duty ends at this point.

But under the draft Model Rules, if the FCPA violation creates a risk of substantial harm to the company, the international lawyer would have at least a right (and perhaps also a duty) to go to the

87a. The Supreme Court reversed on 13 January 1981 and extended the privilege to include lower-echelon employees, 49 *U.S. Law Week* 4093 (1981).

88. Although some states grant a privilege to communications with accountants, most states do not do so. See O'Neal & Thompson, "Vulnerability of Professional-Client Privilege in Shareholder Litigation," 31 *Bus. Law.* 1775, at 1795-96 (1976).

89. Cf. Block & Barton, supra n. 84 at 17-19.

90. See decisions discussed, supra n. 10.

91. The engagement of outside accountants by special investigating counsel (instead of their employment by the client) may enable a claim of privilege for the outside accountants' reports to the counsel, as an element in the effective rendition of legal services. See Block & Burton, supra n. 84 at 18.

board level. This is obviously a matter of delicate assessment. If the violation is not clear-cut, but rather an instance where the lawyer feels that management's conduct is wrongful rather than in the gray area, but realizes that another attorney might feel otherwise, then the lawyer should be reluctant to go to the board. Similarly, if the violation involves relatively small amounts of money and relatively low-level corporate management on the one side or low level foreign officials on the other, or if the violation was an isolated past event, then again the international lawyer might in his discretion feel it inappropriate to go to the board.

If, on the other hand, the American international lawyer is privy to or has become acquainted with a systematic pattern of violations, past and present and presumably continuing, condoned by senior management and adroitly concealed, it would then appear to be the international lawyer's right (and many would say his responsibility) to disclose this to the board. Management's conduct not only jeopardizes the corporate entity in terms of fines or loss of reputation, but also calls into question the ethical standards under which management is operating generally and its fitness to serve as agents of the board. The lawyer should therefore either exercise his right to report to the board or outside directors, or should alternatively resign from further service to the client.

This leaves the most difficult question, whether the American international lawyer has a duty to reveal FCPA violations to the SEC or, where a company not under SEC jurisdiction is concerned, to the Justice Department. The SEC has not formally ruled that lawyers must take this initiative, which would go beyond the obligation to report to higher corporate levels as required by the leading decisions to date, such as *In re Carter*[92] or *National Student Marketing*.[93] The SEC certainly approved of the attorney who did this in the *Meyerhofer*[94] case, and nothing in the Second Circuit opinion, which admittedly dealt with other matters, suggests that the court criticized the attorney's decision to go to the SEC.

The present CPR, in DR 4-101(c)(3), states a rule that the lawyer "may" (not "must") reveal to proper authorities a client's intent to commit a crime, and the lawyer may presumably breach privileged communications in order to do so.[95] Under this rule, an inter-

92. Supra n. 12.

93. Supra n. 11.

94. Supra n. 20. Various SEC Commissioners have suggested that the Commission is moving toward a statement of such a duty. See the references in Hoffman, supra n. 7 at 1400-01, and his conclusion that the SEC view is that "there may be times in the non-litigation representation of corporate clients when a lawyer's duty to his client must be subordinated to his responsibility to protect a particular segment of the public." Id. at 1401.

95. Cf. Annotated CFR, supra n. 1 at 178-80.

national lawyer may, if he chooses, reveal to the Justice Department or the SEC any firm intention of his client to violate the FCPA in the future. That would not be the case as to a past violation of the FCPA, unless the client is subject to the reporting requirements of the SEC, in which event failure to disclose the past crime may in itself be a continuing violation of the law.[96]

Again, the MRPC go beyond the current CPR in stating in Rule 1.7(c) that a lawyer may disclose confidential information about a client "to the extent it appears necessary to prevent or rectify the circumstances of a deliberately wrong act by the client." The Comment to this Rule notes: "the lawyer's exercise of discretion requires consideration of the magnitude and proximity of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client." It is fair comment to say that this draft MRPC rule is highly controversial and will be adopted, if at all, only after considerable debate.[97]

In the present state of the law and under the present CPR, most American international lawyers would probably prefer to resign and keep silent, after having exhausted all possible recourse within the corporate management structure, rather than breach client confidence and report the matter to the SEC or the Justice Department. However, influenced by the draft MRPC, and feeling that evolving ethical standards require a greater concern for public interests, some lawyers may feel they should exercise their right to report violations to the SEC or the Justice Department in especially grave circumstances. This might be true where the lawyer is aware that ongoing conduct could create political problems for the United States itself. It might also be true in a case where the lawyer would feel it appropriate to go to shareholders in a close corporation, but the client is a widely-held public corporation, so that the only protection for shareholders must lie in dealing with the SEC.

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96. Prof. Hoffman makes this point and refers also to the "ripple effect" of past illegal activity. See Hoffman, supra n. 7 at 1402-03, as well as his analysis of when a lawyer might want to exercise a permissive right to disclose a client's intent to commit a crime, id. at 1408-11. See also the careful discussion of conflicting principles in Block & Burton, supra n. 84 at 43-51. The authors note: "In the absence of definitive principles prescribing counsel's obligations at this stage, counsel is faced with a choice between revealing to the SEC the matters [past violations of law] which have been and will continue to be undisclosed [by the client] and risking a violation of professional ethics, and in remaining silent (whether or not coupled with resignation) and risking a violation of the securities laws." Id. at 46.

97. The N.Y.C.B.A. Committee on Professional and Judicial Ethics rejected MRPC Rule 1.7 in arguing that: "a mandatory disclosure obligation is likely to result in the exclusion of lawyers from many client deliberations—particularly in the area of product, occupational, or environmental safety—where a lawyer's guidance and judgment would be most helpful and where the lawyer's ability to counsel the client on the legal as well as the moral consequences of its conduct would be decisive." See *Committee Reports*, supra n. 4 at 16.

Obviously, all of the above considerations require a delicate and careful exercise of judgment by the American international lawyer, who should also keep in mind the November 1975 ABA Statement of Policy Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to Laws Administered by the SEC,[98] as well as the December 1979 Statement of the Section of Corporation, Banking and Business Law commenting on the proposal of regular reports to the board on management misconduct.[99] Both of these statements stress that the lawyer is not to act as a policeman in the absence of any statutory rule to that effect, and that the lawyer must encourage clients to consult freely and fully, as well as to assist clients in correcting the circumstances of temporarily erroneous conduct. One should particularly remember the apt comment of the November 1975 ABA Statement of Policy that lawyers sometimes have the right to advise clients to contest "a perhaps erroneous position of the SEC or questionable lower court decisions."[100]

Compliance with Foreign Laws and Customs

The fundamental question confronting the American international lawyer who counsels or assists American and foreign clients abroad is whether the standards of the present CPR or the draft MRPC apply only to conduct within the United States or also to transactions governed by foreign laws and customs.

To place the issue in a pragmatic context: to what extent can the American international lawyer in good conscience advise or assist an American or a foreign client in the evasion of foreign laws? Is it relevant that the foreign laws in question are widely ignored by foreign nationals, or that noncompliance by foreign nationals is regarded in their own society as ethically neutral?

One initial principle would seem to be clear: if the American international lawyer is physically resident in a foreign country, practicing law in effect as a guest lawyer with some recognized status in that country, certainly he should at least peg the minimum level of his standard of conduct as high as that set by the rules of professional conduct for local lawyers.[101] Thus the American lawyer resident in London, Mexico City, Paris or Hong Kong should in substantial measure pattern his conduct after that of local solicitors

98. 31 *Bus. Law.* 543 (1975).
99. Supra n. 82.
100. Supra n. 98 at 544.
101. In France, foreign lawyers may qualify for the status of Legal Advisor ("conseil juridique") under terms of art. 55 of the Law No. 71-1130 of 31 Dec. 1971, *J.O.* 5 Jan. 1972. See Herzog, "The Reform of the Legal Professions in France," 22 *Int. & Comp. L.Q.* 462 (1973); Comment, "The Reform of the French Legal Profession," 11 *Colum. J. Transnat. L.* 435 (1972).

or the equivalent.[102]

This would necessarily mean that he could not advise or assist a client, whether American or foreign, especially if the client is a domiciliary of the country of the lawyer's residence, in the evasion of tax, exchange control, labor law, product liability or other regulations of the country of residence. This leaves the lawyer free to provide advice in gray areas, where avoidance rather than evasion is the goal, and he can to some degree use as the touchstone for regulating his conduct the approach to similar problems taken by respected local counsel. Naturally, the American lawyer will also fix his standard of conduct at least as high as that prescribed by the local rules with regard to conflicts of interest, or respect for client confidence, or advertising legal services.[103]

This still leaves open a much broader field of inquiry. What standards should govern the conduct of American lawyers resident in the United States, advising on foreign transactions for either American or foreign clients, and analogously what standard should govern the American lawyer resident abroad but advising on transactions outside his country of residence?

Presumably, no one is apt to raise much of an issue when an American lawyer advises a foreign national or an American client on the outright evasion of laws of totalitarian systems or laws which blatantly violate human rights and dignity. American lawyers who assisted Jews, socialists or other persons persecuted by Nazi Germany to flee the country or to contrive to take property abroad in violation of German law would not seem open to censure and would rather deserve praise. One would not think that an American lawyer assisting a Soviet writer to receive foreign copyright royalties in foreign bank accounts in violation of Soviet law should be condemned either.

By analogy, an American lawyer should not feel inhibited in assisting residents of regimes fairly universally criticized for human

102. For coverage of general considerations relating to practice of foreign lawyers in a host state, see Kosugi, "Regulating Practice by Foreign Lawyers," 27 *Am. J. Comp. L.* 678 (1979). Earlier surveys are in Busch, "The Right of U.S. Lawyers to Practice Abroad," 3 *Int. Law.* 297 and 3 *Int. Law.* 617 (1968); Comment, "International Legal Practice Restrictions on the Migrant Attorney," 15 *Harv. Int. L.J.* 298 (1974).

103. This is the status in France, supra n. 101. In the Common Market, Council Directive of 22 Mar. 1977 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, *J.O.* No. L 78/17 (26 Mar. 1977), provides to lawyers who are nationals of a member state the right to provide legal services in another member state. The lawyer remains subject to the rules of professional conduct of his own state, but also must respect those in the host state, especially as to "professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity." Id. at art. 4. These EEC law principles might well serve as analagous guidelines for American lawyers resident in various host countries abroad.

rights violations to escape repressive laws, e.g., assistance to residents of the former regimes in Cambodia or Uganda. The list can probably stretch to include victims of human rights violations in certain other countries in Latin America, Asia or Africa or, for that matter, Europe (one thinks of Greece under the colonels).

Where is the line to be drawn? Must the client be a victim of a human rights violation, certified as such by the International Commission of Jurists or Amnesty International? Or is it necessary that the regime has been condemned by one of these bodies? May the lawyer assist a liberal businessman, in no immediate danger, but who opposes certain policies of the regime? May the lawyer assist any person, a resistant or otherwise, in the removal of property from such a country in violation of its laws, simply because its government is repressive to some extent?

Part of the problem is that, to some degree, educated public opinion shifts on the broad categorization of regimes. The lawyer who today assists an Iranian resident to remove property in violation of Iranian law is unlikely to be censured in the U.S., whereas in the initial enthusiastic reaction of liberal American sentiment after the abdication of the Shah, similar conduct might have been regarded censoriously.

Cases of this sort, of course, tend to arise in the practice of the average American international lawyer quite infrequently and do not accordingly pose that serious an ethical problem. The international lawyer, faced with the issue of whether to assist a foreign client in evasion of a repressive foreign law, would presumably attempt to educate himself as to the character of the regime imposing the law, and the reaction of respected neutral bodies, such as Amnesty International or the International Commission of Jurists, which monitor violations of international standards of human rights. The international lawyer's judgment ultimately is apt to be a personal one, as reasonable observers certainly do differ in the characterization of many regimes. Under these circumstances, the risk of review of any international lawyer's judgment, even if erroneous, by an ethics committee, or any other peer judgment process, is certainly minimal.

There are however a whole series of problems which arise frequently in international business practice and which pose very difficult issues indeed.

A. Assistance Concerning Bribery

(1) May an American international lawyer advise a European client concerning the structure of a transaction, and assist in negotiations, when the transaction involves bribery of a foreign official in a

Mid-Eastern or African state? (It is assumed that the European national's own domestic law does not forbid such bribery of a foreign official.)[104] Does it make a difference whether bribery is illegal or not in the country of the foreign official, or whether it is commonplace or unusual?

(2) May an American international lawyer assist a Mid-Eastern client to set up a corporate structure and to draft agreements enabling that client to serve effectively as a commission agent on behalf of American firms in obtaining foreign commercial contracts, when the Mid-Eastern client has the reputation of being a "fixer," engaged in bribery of foreign officials? Is there a difference depending on whether the American lawyer is expressly told, or merely surmises that the client will use the structure for such foreign payments?

May the lawyer assist if his client is in fact a member of the ruling family, or a cabinet official or general in such a country and the client will himself be the recipient of payments which are either outright bribes or of a highly dubious character?

B. Evasion of Tax Laws

(1) May an American international lawyer advise a prominent Swedish film director or a leading French pop singer on the creation of Swiss entities, and the subsequent allocation by contract of a part of the client's service income to these entities, thus avoiding income tax in the client's own country? Does it matter that the client claims that in no case are U.S. taxes, or royalties from United States sources involved? May the lawyer do this if he writes a letter to the client stating that he assumes the client will nonetheless declare all appropriate revenue to his home country based on local tax advice? Or is such a letter merely hypocrisy?

(2) May the lawyer structure an intercompany network on behalf of a multi-national corporate client so as to shift local sales or service income from the client's home country through the use of marketing "mark-ups," trademark royalties, administrative service fees, or the like, to an ostensibly unrelated affiliate which the lawyer knows to be actually owned by the client through fiduciaries? May he do so if the affiliate is owned of record by the client and all documents could be examined by the client's taxing authority? Does it make a difference that the client's taxing authority is either aggressively pursuing intercompany transactions, or is so overworked or under-staffed that the prospect of examination is slight?

(3) May the lawyer advise an American businessman taking

104. See Goldstein, supra n. 53.

up residence in certain states that his local counterpart customarily declares only about 50% of his income, in view of the high local tax levels, and that, accordingly, the American businessman should request his employer to pay 50% of his salary on a different contractual basis outside of the country? Is this proper so long as the American lawyer makes it quite clear that the client must fully declare all income to the IRS? May the lawyer simply explain the local pattern of tax evasion to the client over lunch and recommend a reputable local tax lawyer well known to the American lawyer?

Does it make a difference if the client is itself the employer and has already adopted the policy of automatically paying 50% of overseas employees' income in a different contractual form, so that the lawyer is merely requested to implement this policy locally?

(4) May the lawyer assist a client in the acquisition of a foreign corporation when a substantial condition of the arrangements is part payment of the acquisition price to the seller outside of the seller's country of residence? May he assist in the acquisition if the side agreements are drafted by local counsel and he is merely aware of their existence? May the lawyer ever represent the seller in such a context?

(5) May the lawyer assist a corporate client in the execution of an acquisition in a foreign country, when the lawyer is aware that the seller's corporate books do not reflect the true accounts, so that the acquired company has not been paying full local income tax for several years? May the lawyer in this context advise the client that he should regularize affairs for the future but that he need not rectify the past? May the lawyer assist the client if he realizes that the client intends to continue the policy of tax evasion by the subsidiary? May he do so if the client intends gradually to regularize the situation over several years, since immediate regularization could pose substantial risks of tax penalties for the seller?

C. Exchange and Investment Controls

(1) May an American international lawyer assist an individual client in the creation of corporate entities or trusts outside the client's country of residence, and the drafting of agreements intended either to remove currency from the country in clear violation of exchange controls or to fail to repatriate income earned abroad in violation of exchange controls? Is it relevant that the client is afraid of a prospective communist or radical takeover of his country? Is it relevant that violations of exchange controls of that country are commonplace and, arguably, regarded as ethically neutral?

(2) May the lawyer advise a foreign client who occupies a high government office in his country, or is a senior member of the mili-

tary of his country, in undertaking major foreign investments from funds located outside the country (perhaps numbered Swiss accounts), under circumstances which make it obvious or highly probable that the funds were removed from the client's country in violation of exchange controls? May the lawyer treat all moneys as fungible and ignore the possible or probable source?

Is the case different if the lawyer suspects, or has reason to know that the funds originally came from bribery of the client by foreign parties? Does the lawyer have any duty to attempt to determine whether the parties paying the bribes included any American interests?

(3) May the lawyer advise an American client and structure a transaction or investment in a country whose laws mandate 50/50 joint ventures, when the lawyer is also requested to assist the client in preparing fiduciary agreements so that a local person will serve as the ostensible 50% owner but is in fact a strawman? Is it relevant that respected local counsel states orally that use of strawmen is quite customary, and that the government usually "winks" at the practice? May the lawyer do so if arrangements for the subsequent transmission of the strawman's profits to the client outside the country are stated not to be the lawyer's concern? May the lawyer assist if he merely has reason to believe that the client's joint venture partner is a strawman but has no direct knowledge of the fiduciary arrangements?

Are the circumstances altered for the lawyer if he has reason to believe that the client and/or the strawman may be bribing government officials to secure the requisite investment authorizations?

D. Dubious But Not Illegal Conduct

(1) May an American international lawyer assist a foreign client in a transaction which would represent a violation of unfair competition principles in the United States but does not violate any statute or case law in the foreign country, e.g., assist the client in structuring payments to an individual who is selling industrial or commercial know-how of a competitor; or assist a client who is hiring away employees of a competitor in order to reduce the competitor's ability to operate; or assist a client who is employing trademark, trade design or packaging approaches which are intended to be confusingly similar to those of the competitor? Does it make a difference if local counsel can give an opinion that the practice does not violate any local law? Does it make a difference if the client is the subsidiary of an American parent and managed by American businessmen?

(2) May an American international lawyer assist an American

client in the sale in foreign countries of pesticides, food products or cosmetics whose sale is forbidden by the FDA in the United States, when the laws of the foreign countries do not prohibit the sale of these products? Does it make a difference whether the foreign country in question has its own elaborate consumer protection legislation and good laboratory test capacity, or whether the country is economically disadvantaged with limited capacity to appraise the safety of similar products? May the lawyer assist such sales if the results of the FDA analyses and the text of the findings are annexed to the contract of sale? May he do so if the product is an effective pesticide and the country in which the product is to be sold has severe pest infestation creating health problems, such as malaria, which are not serious in the United States? Does it make a difference if the lawyer's client is a foreign distributor who is buying the products at a discount price for resale?

(3) May the lawyer assist an American or foreign client in the sale of weapons to an authoritarian or dictatorial regime, whether or not an ally of the U.S.? Does it matter whether the weapons are apt to be used only in wars (fighter planes, warships) or could equally well be used to suppress internal dissent (tanks, machine guns, rifles)? Is there a difference if the weapons are commonly used for riot control (personnel carriers, stun guns, face masks) and are not apt to cause serious injury or death?

All of the above questions pose a variety of problems and the answers may fall on a spectrum ranging from a clear prohibition of assistance to one of probable permission of assistance. It is quite likely that many American international lawyers would differ as to the results in given instances, and certainly it is clear that practice among many American lawyers in handling these problems is often substantially dissimilar. Are there any guidelines?

The touchstone for the American international lawyer should be EC 1-5 of the present CPR: "A lawyer should maintain high standards of professional conduct . . . . he should refrain from all illegal and morally reprehensible conduct . . . . obedience to law exemplifies respect for law."

Fixing minimal standards under this ethical canon is Disciplinary Rule 1-102 which provides that a lawyer shall not "(4) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (5) engage in conduct that is prejudicial to the administration of justice."

As discussed earlier in this article, the draft MRPC broaden somewhat the concept of wrongful conduct in Rule 2.3, and permits the lawyer to decline advice not only when it would violate the law but also when it is "repugnant" to the lawyer to offer the advice.

Similarly, in Rule 4.3 dealing with the lawyer's duties in negotiation, the lawyer's obligation is to refrain from assistance not only with regard to illegal or fraudulent, but also "unconscionable" transactions.

It should not be a startling premise that an American lawyer should have an analogous respect for the law and the administration of justice in a foreign state, whether a democracy or not, so long as the state is not totalitarian and the relevant laws intended to repress human rights. It should also not be a startling premise that the American international lawyer has a duty to avoid morally reprehensible conduct, or to refrain from assisting clients in morally reprehensible or unconscionable conduct, regardless whether the conduct is within the United States or abroad. Just as the lawyer's standards of personal ethical conduct should not significantly change when he takes a plane to fly to Paris, Bogota, Dakar or Kuwait, so also his standards of professional conduct should not substantially vary based on local geographic site.[105]

It is undeniably true, however, that different national outlooks and different cultural patterns in the world engender different standards of ethical conduct and respect for the law. The lawyer certainly may and should have a pragmatic awareness of such different standards in foreign countries and not attempt to gauge his American or his foreign client's conduct by standards which reflect those of the American community under all circumstances. Sometimes the American international lawyer will deem that the local standards are justified in light of the socio-cultural environment; and sometimes he may conclude that the local standards are evolving or immature and, consequently, those of the United States are appropriately to be applied because ultimately they are to be pursued anywhere in the world.

Furthermore, there may be circumstances when the lawyer may feel he may assist a client in otherwise illicit or reprehensible conduct because the client has not voluntarily instigated the conduct but is forced into it as a result of circumstances beyond his control. These circumstances may include pragmatic adherence to local patterns of conduct which the client is in no position to modify.

Applying these standards always involves a personal exercise of conscience. Perhaps some of the following conclusions would be generally accepted; others are offered as strictly personal views. Let us return to the categories of questions indicated above:

105. Note that in the Common Market Directive which governs the conduct of EEC lawyers providing legal services in another state, supra n. 103, the lawyer is always deemed to be bound by the rules of professional conduct of his own state, as well as those of the host state.

A. Foreign Bribery

It would seem clear that an American international lawyer cannot assist an intermediary who is devising schemes in violation of the Foreign Corrupt Practices Act, even when the lawyer does not know the identity of the American concern involved in the payment. The lawyer's conduct would be abetting a violation of law by Americans, even though his client is not an American. The same reasoning would prevent an American lawyer from counseling a foreign client who is himself a recipient of corrupt payments from American sources.

Moreover, the Foreign Corrupt Practices Act was certainly intended by Congress to embody a standard of ethics for worldwide business conduct.[106] The United States government is actively involved in attempting to have these standards adopted by UN convention or other means.[107] Even if the American lawyer has personal qualms about the pragmatic advisability of legislation of this sort, it would appear professionally improper, or at least inapropriate, for him to serve a foreign client in carrying out the sort of bribery clearly proscribed by the FCPA, even when the payors of the bribe and the recipients are all foreign. On the other hand, the lawyer might feel that there is no reason to be guided by FCPA concepts which are ambigious, i.e., the lawyer might advise a European client to be guided entirely by local standards in determining when "grease" payments are proper to lower level officials.

B. Violation of Tax Laws

The distinction between avoidance and evasion of taxes is one which exists in other parts of the world as well. The gray areas are perhaps greater in other countries than in the United States and there seems to be no reason why the American lawyer must draw the line differently than drawn by reputable and competent local tax practitioners. The professional responsibility duty here would have its chief impact in obliging the American international lawyer to take reasonable care in selecting a reputable local tax counsel, as opposed to one who is perhaps quite competent but with a limited sense of social or ethical responsibilities.

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106. The *Report of the President*, supra n. 55 at 10, states: "The Administration and the Congress have taken the unequivocal position that corruption in international business transactions is morally repugnant and economically unnecessary."

107. President Carter also stated: "Eliminating illicit payments in international business should be a matter of concern to all nations. My Administration has been pressing—unsuccessfully to date—for a multilateral agreement in the United Nations." Id. at 10. See also the discussion on international efforts, such as the ICC Rules of Conduct and the draft UN agreement, in "Foreign Corrupt Practices Act of 1977 and the Regulation of Questionable Payments," supra n. 68 at 633-39.

This would mean that the American international lawyer may properly advise American or foreign clients on intercompany structures and intercompany agreements which may or may not meet objective standards of arm's length dealings, when there is no fraudulent concealment of true interests and when there is no intention to provide forged, fraudulent or misleading information to the local tax authorities. The American lawyer's duty would be merely to be sure reputable local tax counsel has also examined the structure or the contract relationship. If the local authorities are not zealously investigating such arrangements, or are overworked or under-staffed, this is not the direct concern of the lawyer.

It is also certainly true that there are differing concepts of "tax morality" in different parts of the world. Payment of taxes in some countries is by custom somewhat of a bargaining process and perceived as such, regardless of the formal legal structures and sanctions. Nonetheless, the international lawyer would not seem justified in assisting a foreign client from a country where tax honesty is the norm to structure arrangements so as to receive income outside of the client's country of residence. It is entirely hypocritical for the lawyer to advise the client to declare income fully when the lawyer knows that the purpose of the arrangement can only be to avoid such a declaration.

On counseling an American businessman or other national about declaration of personal income in foreign countries where the common practice is not to declare full income, it would seem that respect for the local law as written should lead the American lawyer to refrain from directly advising the client to disclose less than his full income, or assisting the client in preparing documents which conceal income. That would not necessarily imply that the American lawyer must urge the client under all circumstances to declare all income. Many international lawyers would feel that their obligation is to recommend the client to reputable local tax counsel, thus leaving the burden of advice to a local professional who is not only knowledgeable in the law, but guided by local ethical and bar concerns in advising the client.

As to the problem of split purchase price payments in an acquisition or other transaction when demanded by the seller or other party to the transaction, the client in this instance usually has not voluntarily instigated the dubious conduct. The American international lawyer may urge the client to bargain for full payment in the local country but certainly cannot control his client's conduct—particularly when, as is often the case, the transaction will not take place without the split payment. If the client arranges through the use of foreign lawyers or bankers for both the payment outside the country of sale and the contracts relating to the payment, the Amer-

ican international lawyer may, arguably, proceed with the drafting of the basic acquisition or other accords. He may know that there are other parts of the transaction, but he is not directly concerned with their implementation.

By contrast, it would seem professionally inappropriate for the American international lawyer to negotiate the arrangements, or assist in drafting documents related to that part of the payment which violates local law. The lawyer may well recognize that his client is not in a position to alter the bargaining position of a seller who insists on part payment abroad, or indeed that his client generally is willing to follow the morals of the local marketplace. But it seems a doubtful professional attitude (although perhaps this is an entirely personal perception) for the lawyer to go beyond this recognition of marketplace realities and actively collaborate in the clear evasion of a foreign law.

It would seem clear that under no circumstances should an American international lawyer assist the seller or other recipient of payments abroad in the negotiation of the illicit part-payments or in drafting documents related thereto.

Where a client is about to acquire or has acquired a company whose books have been "cooked" in the past to evade taxes, the misconduct is not attributable to the client and the lawyer may perfectly well assist in future regularization. The method of regularization and the time period involved obviously raise delicate issues and undoubtedly the proper person to deal with this should be a local competent and reputable tax adviser. To the extent, however, that the client looks to the American lawyer as his chief advisor on the transaction, the latter should encourage regularization as rapidly as possible, consonant with local practice. Admittedly, the lawyer may recognize that it is useless to advise the client to regularize so rapidly as to place the seller in jeopardy, but once the company has been acquired, the prime concern must be the protection of the client's own interests and its adherence to local law.

It can be the case that local business practice is never to disclose full income and that the tax structure and tax calculation system are founded upon a tacit apprehension and acceptance of this. In other words, if the American client's subsidiary starts to declare full income, it will be taxed at levels which will render it uncompetitive with local concerns. In this context, the only solution is again to permit the client to be directly counseled by reputable local tax practioners, since the American lawyer does not have the capacity for gauging the proper ethical judgment to be attached to non-compliance with the tax laws.

A factor of substantial importance however is whether the cli-

ent's new subsidiary, either regularizing its books and tax payments over a period of time, or deliberately not complying with local tax and accounting rules, may not be creating a risk of violation of U.S. laws or otherwise creating a substantial risk of injury to the parent. The new accounting requirements of the FCPA, applicable to all entities subject to SEC jurisdiction, must be followed as to foreign subsidiaries whose results are consolidated with those of the parent. Moreover the international lawyer may properly remind the middle management executives of his client that there may be a risk of challenge to the subsidiary's practices from a shareholders' derivative action directed against the parent, or that a tax inquiry in the foreign country may injure the parent's reputation for business integrity and fair dealings. In some circumstances, such concerns may force abandonment of negotiations to acquire a foreign concern when the seller refuses to take the risk of the U.S. buyer's prompt regularization of accounts and tax declarations for the future.

C. Exchange or Investment Controls

Exchange and investment controls are a regulatory structure felt by certain states to be desirable as economic safeguards to ensure monetary stability or to protect or enhance native industry and technology. As such, their observance does not necessarily evoke the same ethical reaction from their citizens as do other legal norms. Just as certain countries have tax laws which are more honored in the breach than in the observance, so some countries have exchange or investment control laws of which the same statement can be made. An American international lawyer is not cynical to be aware of this.

Many of the conclusions drawn with regard to the observance of tax laws would apply here by analogy. The American international lawyer should not directly assist the client in drafting documents or structuring a transaction to make a joint venture partner merely a strawman. On the other hand, it is arguable that the lawyer need not refrain from assisting a client as to its formal 50% investment in a particular country simply because the lawyer has reason to know or surmises that the joint venture partner is in fact a strawman. Once again, the professional responsibility would seem largely to consist in the careful selection of reputable local counsel upon whose advice the client may properly and safely rely.

Where the issue is assistance to a foreign client in the actual removal of funds from a country, or in the failure to repatriate foreign currency earnings to a country when this constitutes a clear violation of exchange controls, it would seem that an American international lawyer cannot assist the client in the conception of the

scheme or in its implementation. The exception, of course, would be when the lawyer, applying his individual sense of conscience and guided to some degree by the perceptions of organizations such as Amnesty International or the International Commission of Jurists, may feel that the client is a victim or prospective victim of a repressive regime. International lawyers may differ as to whether to aid a client, resident in an essentially democratic state, who fears the possibility of a communist or radical takeover, and wishes to remove assets in violation of the law. A personal view would be that this is not sufficient to warrant an exception to the rule of respect for the foreign law, especially since widespread non-compliance may only aggravate the problems of the local regime.

As to assistance in investment advice to a foreign client who already has funds outside his country of residence, the issue is more uncertain. One possible approach is that the lawyer need not investigate zealously how and when the client acquired the funds; on the other hand, if the lawyer has reason to know or is frankly told by the client that the funds have been or are being taken from his country of residence in violation of exchange controls, he should refrain from further assistance. Not to do so would be to assist the client in attaining the fruits of conduct which must be considered as reprehensible, unless the local government is utilizing its exchange control legislation for repressive purposes. The American international lawyer is usually not in a position to make a judgment that a foreign government is behaving capriciously or improperly in its application of exchange control legislation, but must rather assume that the purposes are legitimate monetary or economic safeguards.

This is, of course, even more clearly the position to be taken by an American lawyer who has reason to believe that the client obtained the funds through the receipt of bribes, regardless whether these came from American or foreign sources.

D. Dubious but not Illegal Conduct

It is certainly true that standards of business morality and criteria of business judgment vary from society to society, so that conduct proscribed by legislation or case law in the United States may not be so in other countries. Nonetheless, the American lawyer should normally be guided in his perception of what is unfair competition by the perception of the courts, legislators or commentators in the United States. There may be exceptions, based upon different socio-economic patterns in a foreign country, but, generally speaking, the American lawyer should hesitate to assist a client, whether American or foreign, in conduct which would violate American unfair competition principles. Again, it may be appropriate for the law-

yer to carefully select a reputable local counsel to review the conduct in question under local unfair competition standards and allow the client to be guided by the advice of this counsel.

The sale of goods or providing of services which may violate stringent health or environmental control standards in the United States, but which are not illicit abroad, poses a difficult problem. There are obviously instances when the client's conduct is simply morally reprehensible or unconscionable and the lawyer should refrain from assisting the client. This is true when the products represent a serious health or safety hazard and it is merely the absence of effective legislation or administrative processes in the local country that permits their sale. Obviously, this is the case in many third world countries whose legislative or administrative machinery is weak or which have many other pressing concerns.

It is however possible that standards in the United States have been fixed so as to eliminate all risk, while the standards of the foreign country do not represent a legislative or administrative determination that all risks must be circumvented. In that event, so long as there is proper disclosure of all possible risks, such as annexing the relevant determinations of the FDA, there would seem no reason why the client's conduct in selling the goods is reprehensible and the lawyer may freely assist him.

Finally, in many countries there is only a choice of evils. Products whose side effects are too harmful to be used in the United States may be regarded as essential in other countries where the harmful side effect is perceived as having less importance than the principal desirable effect—e.g., the use of DDT to exterminate malaria-carrying mosquitoes. Once again, so long as the lawyer is of the opinion that the risks have been considered by the buyers, there is no reason not to assist the client in the transaction.

The sale of weapons poses issues on which there is a substantial divergence of ethical views in the U.S., as elsewhere in the world. There is little likelihood of consensus among American international lawyers, any more than in the U.S. population at large. It is probably more apt to be the case that an American international lawyer will find it personally repugnant to assist in a sales transaction involving arms than that he would find it ethically improper to assist such a client. When the lawyer represents a client most of whose products are standard consumer goods, but which has an arms-making division, the lawyer may have a difficult decision whether to refuse to assist in an arms-sale and risk losing the client, or to assist in violation of his personal ethical sentiments.

Certainly there is a spectrum of possibilities. Probably few international lawyers would find it ethically improper (though some

might find it repugnant) to assist a client in the sale of riot control equipment to a democratic state, or even an authoritarian one which is an ally and is not repressive. Sale of the same type of equipment to a repressive regime (the former regimes in the Central African Empire or Nicaragua, for example) might provoke a different value judgment.

Probably many American international lawyers would prefer not to assist a client, even a good and long-standing client, in the sale of weapons which might be used to repress (or, to use a more neutral term, to control) internal dissent to a dictatorial regime, whether or not it is formally an ally of the U.S. or neutral. It is the use to which the weapons might be put that would occasion the lawyer's sense of repugnance. Some lawyers would undoubtedly qualify such a sale as unconscionable, and feel their assistance to be inappropriate and even ethically wrong. Other American lawyers might take quite a different view, and feel that the transaction is neutral in character, or even beneficial, depending to some degree on the alleged "leftist" or even "Communist" nature of the principal sources of dissent in the buying nation.

As contracts for the sale of any weapons involve macro-economic, political and social concerns, as well as ethical ones, it is not easy for the American international lawyer to decide how much in good conscience he can assist a client in advising, negotiating or drafting agreements. Certainly it would be appropriate for the lawyer to treat the transaction as quite different from the sale of other goods, and to examine carefully whether he may or may not, or indeed should not, assist the client, in view of the proposed MRPC concepts of non-assistance in "unconscionable" or "repugnant" conduct.

CONCLUSION

This article has taken the recent draft Model Rules of Professional Conduct as a catalyst for reviewing problems confronting the American international practitioner in conducting his practice with proper professional standards. It is certainly true that a number of the draft Model Rules are still tentative (and sometimes controversial). Indeed, the entire MRPC may never be adopted, but their guidelines seem to be more useful in assessing practical problems confronting the international lawyer than the more general guidelines in the older Code of Professional Responsibility. In particular, the draft MRPC provide a good basis for assessing how the international lawyer ought to assist a client in dealing with questions under the Foreign Corrupt Practices Act, and when to refer to higher levels of authority within a corporation the suspected or known vio-

lation of the Act by management personnel. Finally, the present fundamental ethical standards of the CPR, supplemented to some degree by those in the new MRPC, may serve as a touchstone in illuminating some very difficult questions of ethical conduct in regard to violation of foreign laws or non-legal moral norms. Here, the conclusions must be much more tentative and the spectrum of reactions much broader. It goes without saying that all of the conclusions in this article are personal and, to some degree, tentative. Certainly, standards evolve and must be in response to the concerns of society at any given time, as well as the pragmatic considerations of assisting clients in radically different settings. Because his role involves the service of clients in countries of varying legal sophistication, cultural attitudes and ethical norms, the American international lawyer has an especially difficult task in determining the standards for his conduct and the manner in which to counsel and assist clients of widely differing outlooks.

It is useful and appropriate to close this article with this statement from CPR EC 9-2:

> When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal systems and the legal profession.

To which CPR EC 9-6 adds:

> Every lawyer owes a solemn duty . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.